DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 12-1371
Title: United States, Petitioner
v.
James Alvin Castleman
Docketed: May 20, 2013
Linked with 12A882
Lower Ct: United States Court of Appeals for the Sixth Circuit
Case Nos.: (10-5912)
Decision Date: September 19, 2012
Rehearing Denied: December 19, 2012

Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Mar 8 2013	Application (12A882) to extend the time to file a petition for a writ of certiorari from March 19, 2013 to April 18, 2013, submitted to Justice Kagan.
Mar 11 2013	Application (12A882) granted by Justice Kagan extending the time to file until April 18, 2013.
Apr 5 2013	Application (12A882) to extend further the time from April 18, 2013 to May 18, 2013, submitted to Justice Kagan.
Apr 5 2013	Application (12A882) granted by Justice Kagan extending the time to file until May 18, 2013.
May 17 2013	Petition for a writ of certiorari filed. (Response due June 19, 2013)
Jun 12 2013	Order extending time to file response to petition to and including July 19, 2013.
Jul 11 2013	Order further extending time to file response to petition to and including August 19, 2013.
Aug 19 2013	Brief of respondent James Alvin Castleman in opposition filed.
Sep 4 2013	DISTRIBUTED for Conference of September 30, 2013.
Sep 4 2013	Reply of petitioner United States filed. (Distributed)
Oct 1 2013	Petition GRANTED.
Nov 4 2013	SET FOR ARGUMENT ON Wednesday, January 15, 2014.
Nov 15 2013	Record from the U.S.C.A. 6th Circuit is electronic (Not on PACER).
Nov 15 2013	Joint appendix filed. (Statement of costs filed.)
Nov 15 2013	Brief of petitioner United States filed.
Nov 19 2013	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the respondent.
Nov 20 2013	Consent to the filing of amicus curiae briefs, in support of either party or of

	neither party, received from counsel for the petitioner.
Nov 21 2013	CIRCULATED.
Nov 22 2013	Brief amicus curiae of Mayors Against Illegal Guns filed. (Distributed)
Nov 22 2013	Brief amicus curiae of New York State Association of Chiefs of Police filed. (Distributed)
Nov 22 2013	Brief amici curiae of Children's Defense Fund and the American Academy of Pediatrics filed. (Distributed)
Nov 22 2013	Brief amici curiae of Brady Center to Prevent Gun Violence, et al. filed. (Distributed)
Nov 22 2013	Brief amici curiae of National Network to End Domestic Violence, et al. filed.
Nov 22 2013	Brief amici curiae of Major Cities Chiefs Association, et al. filed. (Distributed)
Dec 16 2013	Brief of respondent James Alvin Castleman filed. (Distributed)
Dec 16 2013	Proposal to lodge copies of non-record material in other cases cited in respondent's brief on the merits from counsel for respondent.
Dec 23 2013	Brief amici curiae of Gun Owners Foundation, et al. filed.
Dec 23 2013	Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
Dec 23 2013	Brief amici curiae of ASISTA Immigration Assistance, et al. filed. (Distributed)
Dec 24 2013	Record received from U.S.D.C. Western District of Tennessee (Memphis) (1 Box).
Jan 8 2014	Reply of petitioner United States filed. (Distributed)
Jan 15 2014	Lodging proposal of respondent approved by Clerk. Lodging submitted and distributed.
Jan 15 2014	Argued. For petitioner: Melissa Arbus Sherry, Assistant to the Solicitor General, Department of Justice, Washington, D. C. For respondent: Charles A. Rothfeld, Washington, D. C.
Mar 26 2014	Judgment REVERSED and case REMANDED. Sotomayor, J., delivered the opinion of the Court, in which Roberts, C. J., and Kennedy, Ginsburg, Breyer, and Kagan, JJ., joined. Scalia, J., filed an opinion concurring in part and concurring in the judgment. Alito, J., filed an opinion concurring in the judgment, in which Thomas, J., joined.
Apr 28 2014	JUDGMENT ISSUED.

PETITION
FOR
WRIT OF
CERTIORARI

12-1371

Supreme Court, U.S.
FILED
MAY 17 2013
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

JAMES ALVIN CASTLEMAN

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 922(g)(9) of Title 18, United States Code, makes it a crime for any person convicted of a "misdemeanor crime of domestic violence" to possess a firearm. The phrase "misdemeanor crime of domestic violence" is defined to include any federal, state, or tribal misdemeanor offense, committed by a person with a specified domestic relationship to the victim, that "has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon." 18 U.S.C. 921(a)(33)(A). The question presented is:

Whether respondent's Tennessee conviction for misdemeanor domestic assault by intentionally or knowingly causing bodily injury to the mother of his child qualifies as a conviction for a "misdemeanor crime of domestic violence."

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In the Supreme Court of the United States

No.

UNITED STATES OF AMERICA, PETITIONER

v.

JAMES ALVIN CASTLEMAN

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-33a) is reported at 695 F.3d 582. The order of the district court (App., *infra*, 49a-50a) adopting the report and recommendation of the magistrate judge denying respondent's motion to dismiss (App., *infra*, 51a-71a) is unreported, but is available at 2010 WL 711179. The orders of the district court granting respondent's motion to dismiss (App., *infra*, 34a-42a) and denying the government's motion for reconsideration (App., *infra*, 43a-48a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 19, 2012. A petition for rehearing was denied on December 19, 2012 (App., *infra*, 72a-73a). On March 11, 2013, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including April 18, 2013. On April 5, 2013, Justice Kagan further extended the time to May 18, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reprinted in an appendix to this petition. App., *infra*, 74a-82a.

STATEMENT

Respondent was indicted on two counts of possession of a firearm by a person convicted of a misdemeanor crime of domestic violence, in violation of 18 U.S.C. 922(g)(9), and three counts of making false or fictitious statements to a federally licensed firearms dealer in order to purchase firearms, in violation of 18 U.S.C. 922(a)(6). Concluding that respondent's prior Tennessee conviction for misdemeanor domestic assault on the mother of his child was not a conviction for a "misdemeanor crime of domestic violence," the district court dismissed those counts of the indictment. The court of appeals affirmed. App., *infra*, 1a-33a, 54a-55a.

1. Under 18 U.S.C. 922(g)(9), it is unlawful for any person "who has been convicted in any court of a misdemeanor crime of domestic violence * * * [to] possess in or affecting commerce, any firearm or ammunition." Section 921(a)(33)(A) defines "misdemeanor crime of domestic violence" as a misdemeanor under federal, state, or tribal law, committed by a person with a speci-

fied domestic relationship with the victim, including "shar[ing] a child in common," that "has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon." 18 U.S.C. 921(a)(33)(A)(ii); see *United States* v. *Hayes*, 555 U.S. 415, 420-421 (2009). A person who knowingly violates that provision may be fined, imprisoned for not more than ten years, or both. 18 U.S.C. 924(a)(2).

2. In 2001, respondent was charged in Tennessee state court with misdemeanor domestic assault in violation of Tennessee Code Annotated § 39-13-111(b) (West 2001),[1] which punishes any person "who commits an assault as defined in § 39-13-101 against a person who is that person's family or household member." A "family or household member" includes "a person who has a child * * * in common with that person." *Id.* § 39-13-111(a). Section 39-13-101(a)(1), in turn, provides that a person commits assault by "[i]ntentionally, knowingly or recklessly caus[ing] bodily injury to another." *Id.* § 39-13-101(a)(1). And "bodily injury" is defined as "a cut, abrasion, bruise, burn or disfigurement; physical pain or temporary illness or impairment of the function of a bodily member, organ, or mental faculty." *Id.* § 39-11-106(a)(2). A first conviction for domestic assault under Section 39-13-111(b) is punishable as a Class A misdemeanor. See *id.* §§ 39-13-111(c), 39-13-101(b); see

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[1] Unless otherwise noted, citations to the Tennessee Code Annotated are to the 2001 version. The current version of the relevant Tennessee statutory provisions similarly punish any person "who commits an assault as defined in § 39-13-101 against a domestic abuse victim," and "domestic abuse victim" includes adults "who have or had a sexual relationship." Tenn. Code Ann. § 39-13-111(a)(3) and (b) (West Supp. 2012).

also *id.* § 40-35-111(e)(1) (authorizing a term of imprisonment not greater than 11 months and 29 days).

The state indictment alleged that respondent "did intentionally or knowingly cause bodily injury to [the victim], WHO HAS A CHILD WITH HIM, thereby committing the offense of DOMESTIC ASSAULT, in violation of T.C.A. 39-13-111(b)." Indictment, No. 01CR1672 (May 7, 2001). Respondent pleaded guilty pursuant to a plea agreement, and he was sentenced to supervised probation for 11 months and 29 days. App., *infra*, 53a-54a.

3. In 2008, law enforcement agents discovered that respondent and his wife were buying firearms from dealers and selling them on the black market. In August 2009, respondent was charged in a superseding indictment on two counts of possession of a firearm by a person convicted of a misdemeanor crime of domestic violence, in violation of 18 U.S.C. 922(g)(9) (Counts 4 and 5), and three counts of making false or fictitious statements to a federally licensed firearms dealer in order to purchase firearms on three separate occasions, in violation of 18 U.S.C. 922(a)(6) (Counts 1, 2, and 3). See App., *infra*, 2a, 54a-55a.

Respondent moved to dismiss the indictment arguing, *inter alia*, that his Tennessee domestic assault offense is not a "misdemeanor crime of domestic violence" because it does not "ha[ve], as an element, the use * * * of physical force." 18 U.S.C. 921(a)(33)(A)(ii). The district court granted the motion and dismissed the two Section 922(g)(9) counts. App., *infra*, 34a-50a.[2] The court concluded that "[a]n assault statute that requires the mere causation of bodily injury does not necessarily require the 'use of physical force' for [Section] 922(g)(9) purposes, at least where the statute may be violated through coercion or deception rather than through violent contact with the victim." *Id.* at 40a. The court explained that because a person could violate the Tennessee statute by "caus[ing] a victim to suffer bodily injury by deceiving him into drinking a poisoned beverage, without making contact of any kind, let alone violent contact, with the victim," or by "coerc[ing] the victim into taking the drink," respondent's 2001 conviction "cannot serve as a qualifying misdemeanor crime of domestic violence under [Section] 922(g)(9)." *Id.* at 41a (citing *United States* v. *Villegas-Hernandez*, 468 F.3d 874, 879 (5th Cir. 2006), cert. denied, 549 U.S. 1245 (2007)). The court acknowledged that its decision conflicted with decisions from the First, Eighth, and Eleventh Circuits, but it chose to follow "the teaching of the Fifth, Second, Tenth, Seventh, and Ninth Circuits." *Id.* at 39a-40a.

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[2] The district court had initially adopted the report and recommendation of the magistrate judge and denied respondent's motion to dismiss based on a theory of judicial estoppel. App., *infra*, 49a-71a.

The district court denied the government's motion for reconsideration. App., *infra*, 43a-48a.

4. The United States appealed and a divided panel of the court of appeals affirmed in three separate opinions. App., *infra*, 1a-33a.

a. The court of appeals first considered "the degree of force necessary for a misdemeanor domestic battery offense to qualify as a misdemeanor crime of domestic violence." App., *infra*, 5a. The court explained that because the definition of "misdemeanor crime of domestic violence" largely "tracks" the "crime of violence" definition in 18 U.S.C. 16(a), and the "violent felony" definition in the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(2)(B)(i), Congress presumably "intended them to capture offenses criminalizing identical degrees of force." App., *infra*, 6a-7a. Tracking the reasoning in *United States* v. *White*, 606 F.3d 144 (4th Cir. 2010), the court then looked to this Court's decision in *Johnson* v. *United States*, 130 S. Ct. 1265 (2010). The court of appeals explained that, in *Johnson*, this Court had interpreted the "physical force" requirement in Section 924(e)(2)(B)(i) to require "'*violent* force . . . capable of causing physical pain or injury to another person' and 'strong physical force.'" App., *infra*, 8a-9a (quoting *Johnson*, 130 S. Ct. at 1271). After acknowledging that the circuits are split on the issue, the court concluded that "the degree of force *Johnson* requires for a conviction under [Section] 924(e)(2)(B)(i) is [also] required of a misdemeanor crime of domestic violence." *Id.* at 9a-10a & n.2.

In so holding, the court of appeals rejected the government's argument that *Johnson* did not control. App., *infra*, 12a-13a & n.3. The court recognized that, in *Johnson*, this Court had emphasized the operative phrase "*violent* felony," whereas Section 921(a)(33)(A) defines a "*misdemeanor* crime of domestic violence." *Id.* at 13a n.3 (emphases added). But the court understood "the relevant portion of *Johnson* [to] suggest[] that the misdemeanor-felony distinction is not a viable framework for determining the level of violence an offense must require to qualify as a violent felony." *Id.* at 14a. The court therefore concluded that the phrase "'[m]isdemeanor crime of domestic violence' is most naturally interpreted to mean any crime requiring strong and violent physical force, which happens to be a misdemeanor." *Id.* at 12a.

The court of appeals next considered whether respondent's Tennessee domestic assault conviction categorically qualifies as a "misdemeanor crime of domestic violence," so defined. App., *infra*, 15a-17a. Relying on circuit precedent interpreting the "'use of physical force' clause of [Section] 924(e)(2)(B)(i)," the court concluded that violation of a statute that makes it a crime to cause "bodily injury" "does not require the use of violent force." *Id.* at 16a. Distinguishing the Tennessee statute from a statute that criminalized aggravated assault by causing "serious physical harm," which the court had previously held "necessarily requires proof that the defendant used 'force capable of causing physical pain or injury,'" *United States* v. *Anderson*, 695 F.3d 390, 400 (6th Cir. 2012), the court of appeals reasoned that, under the Tennessee statute, respondent "could have caused a slight, nonserious physical injury with conduct that cannot be described as violent," such as "a paper cut or a stubbed toe." App., *infra*, 16a-17a. Accordingly, the court concluded that respondent's conviction did not qualify as a misdemeanor crime of domestic violence and that the district court correctly dismissed the Section 922(g)(9) counts of the indictment.[3]

b. Judge Moore concurred in a separate opinion. App., *infra*, 21a-23a. She agreed that "the force requirement for a misdemeanor crime of domestic violence is identical to that specified under the crime-of-violence statute and the ACCA." *Id.* at 21a. Under *Johnson*, she explained, "it is not enough to look only at the *result* of the defendant's conduct; instead, the focus must be on the nature of the force proscribed by the statute and whether the *conduct itself* necessarily involves violent force." *Id.* at 22a. Because the Tennessee statute also "criminalizes reckless conduct," Judge Moore applied a modified categorical approach and concluded that respondent's conviction does not fall "within the confines of a misdemeanor crime of domestic violence." *Id.* at 21a, 23a.

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[3] The court of appeals also concluded that respondent's conviction did not qualify as a misdemeanor crime of domestic violence under a modified categorical approach. App., *infra*, 18a-20a. Although the court acknowledged that respondent's state indictment charged him with "intentionally or knowingly" causing bodily injury, the indictment did "not specify the type or severity of injury he caused." *Id.* at 18a.

c. Judge McKeague dissented. App., *infra*, 23a-33a. He argued that the majority erroneously applied *Johnson*'s "violent felony" standard to a "misdemeanor crime of domestic violence." *Id.* at 24a-26a. *Johnson*, he explained, "rejected the argument that the misdemeanor standard should control the felony definition" and, for the same reason, "the felony standard should not control the misdemeanor." *Id.* at 26a. Judge McKeague also concluded that respondent's conviction qualifies as a misdemeanor crime of domestic violence even under "the heightened *Johnson* standard," because "violent physical force is a necessary element to intentionally or knowingly inflicting bodily injury." *Id.* at 27a. He explained that the majority's holding to the contrary "has the effect of making the 'misdemeanor crime of domestic violence' provision * * * a dead letter in Tennessee, as well as any other state using the Model Penal Code's definition of assault to punish domestic abusers." *Id.* at 31a.

5. The United States sought rehearing en banc, but the court declined to reconsider its decision. App., *infra*, 72a-73a.

REASONS FOR GRANTING THE PETITION

The Sixth Circuit has concluded that a person convicted of misdemeanor domestic assault by intentionally or knowingly causing bodily injury to a family member has not been convicted of a "misdemeanor crime of domestic violence" under 18 U.S.C. 922(g)(9). The court of appeals' decision is incorrect for two reasons: (i) "violent" force is not required for a crime to qualify as a "misdemeanor crime of domestic violence" under Section 922(g)(9), and (ii) domestic assault by intentionally or knowingly causing bodily injury has, as an element, the use of "physical force." The Sixth Circuit's erroneous decision implicates two distinct, but related, conflicts among the courts of appeals—conflicts that have deepened since this Court's decision in *Johnson* v. *United States*, 130 S. Ct. 1265 (2010). If allowed to stand, the court of appeals' decision (and those like it) will impede the effective and uniform enforcement of Section 922(g)(9). Domestic abusers are routinely prosecuted under assault and battery statutes that punish offensive physical contact (which is not "violent" under *Johnson*), or the causation of bodily injury (which does not satisfy the use-of-force element in several circuits), or both. This Court's review is therefore warranted.

A. The Decision Below Incorrectly Constricts The Scope Of Section 922(g)(9)

In Section 922(g)(9), Congress extended the longstanding federal prohibition on firearm possession by any person convicted of a felony, 18 U.S.C. 922(g)(1), to persons convicted of "misdemeanor crime[s] of domestic violence." See *United States* v. *Hayes*, 555 U.S. 415, 418 (2009). Congress defined the term "misdemeanor crime of domestic violence" to mean an offense that is a misdemeanor under state, federal, or tribal law, that "has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by" a person with a specified domestic relationship with the victim. 18 U.S.C. 921(a)(33)(A); see *Hayes*, 555 U.S. at 426.

The court of appeals in this case concluded that the federal prohibition on firearm ownership by persons convicted of misdemeanor crimes of domestic violence has no application to an individual convicted of assaulting the mother of his child by intentionally or knowingly causing her bodily injury.[4] The court's analysis proceeded in two steps. First, the court held that the term "physical force" bears the same meaning in the context of defining a "misdemeanor crime of domestic violence" as it does in the context of defining a "violent felony"—a question expressly left open in *Johnson*. Second, the court held that domestic assault by intentionally or knowingly causing bodily injury to a family member does not have, as an element, the requisite degree of "violent" force. Both conclusions are flawed.

1. Section 921(a)(33)(A)(ii) does not require "violent" force for a crime to qualify as a "misdemeanor crime of domestic violence"

The court of appeals held that the use-of-force element in the definition of a "misdemeanor crime of domestic violence" requires "'*violent* force . . . capable of causing physical pain or injury to another person' and 'strong physical force.'" App., *infra*, 8a-9a (quoting *Johnson*, 130 S. Ct. at 1271). The court of appeals' decision is incorrect and its reliance on *Johnson* is misplaced.

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[4] Although Tennessee Code Annotated § 39-13-101(a)(1) also punishes any individual who "recklessly" causes bodily injury to another, respondent was specifically charged with the intentional or knowing causation of bodily injury. See App., *infra*, 18a; *id.* at 21a (Moore, J., concurring).

a. In *Johnson*, this Court considered whether the Florida felony offense of recidivist battery, defined in part as intentionally touching or striking another person against her will, qualified as a "violent felony" under the provision of the ACCA that covered crimes having "as an element the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. 924(e)(2)(B)(i). The Court acknowledged that, at common law, the "force" element of battery was "satisfied by even the slightest offensive touching." *Johnson*, 130 S. Ct. at 1270. The Court also acknowledged that "a common-law term of art should [ordinarily] be given its established common-law meaning." *Ibid.* (citing *United States* v. *Turley*, 352 U.S. 407, 411 (1957)). The Court nevertheless concluded that the common-law meaning of the term "force" was not controlling because that meaning "does not fit" in the context of the ACCA's definition of the term "violent felony." *Ibid.* The Court reasoned that the term "violent," particularly when "attached to the noun 'felony,'" connotes "violent force," *i.e.*, "force capable of causing physical pain or injury to another person." *Id.* at 1271. The Court also considered it "unlikely" that Congress would employ the common-law definition of battery—a crime punishable as a misdemeanor at common law and generally punishable as a misdemeanor today—in defining the term "violent *felony*." *Id.* at 1271-1272 (emphasis added).

The Court, however, expressly reserved the question whether the phrase "physical force" has the same meaning in the context of Section 922(g)(9)'s definition of "misdemeanor crime of domestic violence." The government had argued that "interpreting 18 U.S.C. § 924(e)(2)(B)(i) to require violent force will undermine its ability to enforce the firearm disability in [Section]

922(g)(9)," but the Court found that prediction "unfounded." *Johnson*, 130 S. Ct. at 1273. The Court explained that it had "interpreted the phrase 'physical force' only in the context of a statutory definition of 'violent felony.'" *Ibid.* It did "not decide that the phrase has the same meaning in the context of defining a *misdemeanor* crime of domestic violence." *Ibid.* Because that separate question was not presented, the Court did "not decide it." *Ibid.*

b. The court of appeals erred in importing *Johnson*'s definition of the phrase "physical force" from the context of defining a "violent *felony*" under Section 924(e)(2)(B)(i) into the very different context of defining a "*misdemeanor* crime of domestic violence" under Section 922(g)(9). See App., *infra*, 10a (holding that "the degree of force *Johnson* requires for a conviction under [Section] 924(e)(2)(B)(i) is [also] required of a misdemeanor crime of domestic violence").

The statutory definition of a "misdemeanor crime of domestic violence" tracks the common-law definition of battery, *i.e.*, "the intentional application of unlawful force against the person of another." *Johnson*, 130 S. Ct. at 1270. At common law, that phrase was understood to reach conduct resulting in either "a bodily injury or an offensive touching." 2 Wayne R. LaFave, *Substantive Criminal Law* § 16.2, at 553 (2d ed. 2003) (LaFave); see *Johnson*, 130 S. Ct. at 1271. And, unless context indicates otherwise, the Court ordinarily concludes that "a common-law term of art should be given its established common-law meaning." *Id.* at 1270.

Although the Court in *Johnson* thought it unreasonable to read "force" as having its common-law meaning in the context of the ACCA's definition of "violent *felony*," nothing is incongruous about that reading in the context of a statute defining "*misdemeanor* crime of domestic violence." Cf. *Johnson*, 130 S. Ct. at 1271-1272 (emphasizing Congress's use of the term "felony" in the ACCA). That is particularly so because the domestic abusers targeted by Section 922(g)(9) are "routinely prosecuted under generally applicable assault or battery laws." *Hayes*, 555 U.S. at 427. It stands to reason that Congress would have deliberately employed the common-law definition of battery with the intention of actually reaching individuals convicted of that crime, *i.e.*, individuals who engaged in conduct resulting in either bodily injury or offensive touching.[5]

c. Practical considerations also favor that reading. This Court previously rejected an interpretation of Section 921(a)(33)(A) that would leave the domestic-violence gun prohibition without application to domestic-violence convictions entered in nearly two-thirds of the States at the time Section 922(g)(9) was enacted. See *Hayes*, 555 U.S. at 427. Similar considerations weigh heavily against the court of appeals' interpretation here. Much as in *Hayes*, the court of appeals' interpretation could undermine enforcement of Section 922(g)(9) in much of the country. See *Johnson*, 130 S. Ct. at 1278 (Alito, J., dissenting) (applying the Court's interpretation of the phrase "physical force" in the ACCA provision to Section 922(g)(9) would allow "a great many persons convicted for serious spousal or child abuse" to possess firearms). That is because the generic assault and battery laws of about half of the States do not draw distinctions between different degrees of force. See U.S. Br. at 40, App. B, *Johnson, supra.* If the court of appeals' conclusion that a heightened degree of force is required for purposes of the firearms disability provision stands—a conclusion shared by at least three other circuits, see Part B, *infra*—then a substantial number of domestic-violence convictions would not qualify as "misdemeanor crime[s] of domestic violence" under Section 922(g)(9).[6]

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[5] *Johnson* itself contemplated that the essentially identical language at issue could bear two different meanings because of the surrounding statutory context. 130 S. Ct. at 1273. And the Court has often made clear that the very same phrase—even if used in the very same statute—may mean different things depending on the context. See *Barber* v. *Thomas*, 130 S. Ct. 2499, 2506-2507 (2010); *Environmental Def.* v. *Duke Energy Corp.*, 549 U.S. 561, 574 (2007).

2. *A domestic assault that intentionally or knowingly results in bodily injury necessarily has, as an element, the use of "physical force"*

A domestic assault that intentionally or knowingly results in bodily injury necessarily has, as an element, the use of "physical force." The court of appeals did not dispute that basic proposition, *i.e.*, that domestic assault by causing bodily injury necessarily involves the use of

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[6] Although a modified categorical approach may theoretically remain available, in most cases (like this one) state and local records will not specify the type of injury or degree of forced used. See *Johnson*, 130 S. Ct. at 1273-1274 (acknowledging that this "may well be true," but finding it "implausible" that such a concern "caused Congress to import a term of art that is a comical misfit with the defined term '*violent* felony'") (emphasis added); *id.* at 1278 (Alito, J., dissenting) (agreeing that it will "often be impossible" for the government "to produce documents that * * * conclusively show that the offender's conduct involved the use of violent force" because "charging documents frequently simply track the language of the statute, and jury instructions often do not require juries to draw distinctions based on the type of force that the defendant employed").

some force.[7] Instead, the court held that respondent's bodily-injury domestic assault conviction under Tennessee law does not constitute a "misdemeanor crime of domestic violence" because the crime does not have, as an element, the use of "violent" force. See App., *infra*, 15a-17a. Because "violent" force is not required (see Part A.1, *supra*), and because bodily-injury assault contains the necessary use-of-force element, that decision is incorrect. But even if a heightened degree of force were required, respondent's conviction would still constitute a "misdemeanor crime of domestic violence" under Section 922(g)(9).

a. As a matter of ordinary usage, the defendant's "use" of "physical force" is an "element" of the offense of domestic assault by causing bodily injury because physical force is the means by which injury is necessarily produced. As the First Circuit reasoned in *United States* v. *Nason*, 269 F.3d 10 (2001), "to cause *physical* injury, force necessarily must be *physical* in nature." *Id.* at 20. A person who intentionally or knowingly causes injury to another must "use," or actively employ, physical force to achieve that result. See *Leocal* v. *Ashcroft*, 543 U.S. 1, 9 (2004) (explaining that the word "use" in the context of the definition of "crime of violence" in 18 U.S.C. 16(a) means "active employment") (citing *Bailey* v. *United States*, 516 U.S. 137, 144 (1995)). To convict a defendant of bodily-injury assault, the prosecution must therefore prove that the defendant used physical force against the victim.

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[7] Indeed, in another case, *United States* v. *Anderson*, 695 F.3d 390, 400 (2012), the Sixth Circuit held that aggravated assault by causing "serious physical harm" qualified as a "violent felony" under Section 924(e)(2)(B)(i), because it "necessarily requires proof that the defendant used 'force capable of causing physical pain or injury.'" The court below distinguished *Anderson* solely on the basis that the Tennessee statute does not require proof of "serious" physical injury. See App., *infra*, 16a-17a.

A person plainly employs physical force against another when he causes bodily injury by making direct physical contact with his victim. But the same is true in the unusual cases imagined by the district court, and other courts of appeals, in which the assailant causes physical harm without making direct physical contact with his victim. See, *e.g.*, App., *infra*, 41a; *United States* v. *Villegas-Hernandez*, 468 F.3d 874, 878-883 (5th Cir. 2006), cert. denied, 549 U.S. 1245 (2007); *United States* v. *Perez-Vargas*, 414 F.3d 1282, 1285-1287 (10th Cir. 2005). "If someone lures a poor swimmer into waters with a strong undertow in order that he drown, or tricks a victim into walking toward a high precipice so that he might fall," for example, the offender "has at least attempted to make use of physical force against the person of the target, either through the action of water to cause asphyxiation or by impact of earth on flesh and bone." *United States* v. *Calderon-Pena*, 383 F.3d 254, 270 (5th Cir. 2004) (en banc) (Smith, J., dissenting), cert. denied, 543 U.S. 1076 (2005). "However remote these forces may be in time or distance from the defendant, they were still directed to work according to his will, as surely as was a swung fist or a fired bullet." *Ibid.* (Smith, J., dissenting); cf., *e.g.*, *United States* v. *De La Fuente*, 353 F.3d 766, 770-771 (9th Cir. 2003) (concluding that a threat of anthrax poisoning qualifies as a "threatened use of physical force" under Section 16(a), and explaining that "the bacteria's physical effect on the body is no less violently forceful than the effect of a kick or blow").

That is consistent with the common-law understanding of the term "force." As explained above, battery is defined, in language that tracks the definition of "misdemeanor crime of domestic violence" in Section 921(a)(33)(A), as "the intentional application of unlawful force against the person of another." *Johnson*, 130 S. Ct. at 1270. And, at common law, battery was understood to reach indirect as well as direct uses of force against the body of the victim. See 2 LaFave § 16.2, at 554; see also 2 Joel Prentiss Bishop, *Bishop on Criminal Law* § 72 *a*, at 48-49 (John M. Zane & Carl Zollman eds., 9th ed. 1923) (discussing cases). A person thus committed a battery when, for example, he "administer[ed] a poison" or "[told] a blind man walking toward a precipice that all is clear ahead." 2 LaFave § 16.2, at 554-555; see *e.g.*, *State* v. *Monroe*, 28 S.E. 547, 548 (N.C. 1897) (druggist who sold candy laced with sufficient croton oil to cause injury, knowing that the candy would be administered to another as a trick, was guilty of assault and battery); *Commonwealth* v. *Stratton*, 114 Mass. 303, 303-304 (1874) (defendant, who offered the victim figs that had been drugged without the victim's knowledge, was guilty of assault and battery); Rollin M. Perkins, *Non-Homicide Offenses Against the Person*, 26 B.U. L. Rev. 119, 122 (1946) (explaining that battery, "an application of force to the person of another," may be committed by, *inter alia*, "threatening sudden violence and thereby causing another to jump from a window or a moving vehicle or other place") (footnote omitted). For the reasons discussed above, Congress intended the term "force" in Section 921(a)(33)(A)(ii) to bear that common-law meaning.

b. The court of appeals (unlike the district court) did not dispute that Tennessee's bodily-injury domestic assault offense has, as an element, the use of *some* force. Instead, the court held that it did not have, as an element, the use of "violent" force. App., *infra*, 15a-17a. Even if violent force were required (and it is not, see Part A.1, *supra*), the court of appeals' analysis does not withstand scrutiny.

In *Johnson*, this Court explained that force is "violent" in nature if it is "capable of causing physical pain or injury to another person." 130 S. Ct. at 1271. Respondent was convicted because he "intentionally or knowingly" caused "bodily injury," *i.e.*, "a cut, abrasion, bruise, burn or disfigurement; physical pain or temporary illness or impairment of the function of a bodily member, organ, or mental faculty." Tenn. Code Ann. §§ 39-13-101(a)(1), 39-11-106(a)(2). A defendant can knowingly cause such bodily injury only by knowingly using force capable of causing physical pain or injury. The court of appeals distinguished between "serious" physical injury and the sort of "bodily injury" required by the Tennessee statute, hypothesizing that respondent could have been convicted for causing "a slight, non-serious physical injury," "such as a paper cut or a stubbed toe." App., *infra*, 17a. This Court in *Johnson*, however, did not require a degree of force capable of causing "serious" physical pain or "serious" injury to another person.

In any event, the court of appeals identified no evidence that anyone has been prosecuted under Tennessee Code Annotated § 39-13-101(a)(1) for causing a paper cut or a stubbed toe.[8] In *Gonzales* v. *Duenas-Alvarez*,

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[8] A sampling of Tennessee cases demonstrates that domestic assault prosecutions typically involve more serious injuries that resulted from the use of physical force. See *State* v. *Young*, No. E2012-726, 2012 WL 2465156, at *2 (Tenn. Crim. App. June 28, 2012) (defendant

549 U.S. 183 (2007), this Court made clear that "to find that a state statute creates a crime outside the generic definition of a listed crime in a federal statute requires more than the application of legal imagination to a state statute's language"; it requires a "realistic probability," and not just a "theoretical possibility," that the state statute would be applied in a "nongeneric" way. *Id.* at 193; see *Moncrieffe* v. *Holder*, 133 S. Ct. 1678, 1684-1685 (2013) (explaining that the "focus on the minimum conduct criminalized by the state statute is not an invitation to apply 'legal imagination' to the state offense"). To establish the requisite probability, this Court instructed that an offender "must at least point to his own case or other cases in which the state courts in fact did apply the statute in the special (nongeneric) manner for which he argues." *Duenas-Alvarez*, 549 U.S. at 193. The same reasoning applies here. Cf. *Taylor* v. *United States*, 495 U.S. 575, 599 (1990) (explaining that a state crime counts as an enumerated offense if it has "all the *elements* of" the enumerated crime's generic definition) (emphasis added); *id.* at 598 (identifying the elements of generic "burglary" for purposes of the ACCA, 18 U.S.C. 924(e)(2)(B)(ii)). Purely hypothetical nonviolent applications of Tennessee's bodily-injury domestic assault statute are insufficient to demonstrate that respondent's

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grabbed victim by hair and pulled her to the side of dance floor, where her head hit a pole); *State* v. *Hammon*, No. M2009-723, 2010 WL 3448105, at *1-*2 (Tenn. Crim. App. Sept. 2, 2010) (defendant punched victim with closed fist and threw her to the ground); *State* v. *Murphy*, No. M2007-2416, 2009 WL 1643442, at *1-*2 (Tenn. Crim. App. June 12, 2009) (defendant slung victim by hair into a door jamb and kicked her when she fell to the floor); *State* v. *Terrell*, No. M2006-1688, 2008 WL 271866, at *2 (Tenn. Crim. App. June 30, 2008) (defendant lunged at victim and grabbed her by the throat).

conviction does not qualify as a "misdemeanor crime of domestic violence" under Section 922(g)(9).

B. The Decision Below Conflicts With The Decisions Of Other Courts Of Appeals

The Sixth Circuit's holding that misdemeanor domestic assault by intentionally or knowingly causing bodily injury is not a misdemeanor crime of domestic violence squarely implicates two distinct, but related, conflicts among the courts of appeals. The circuits are divided on whether an element of "violent" force is required for an offense to qualify as a "misdemeanor crime of domestic violence" under Section 922(g)(9). The courts of appeals are also divided on whether misdemeanor assault by causing bodily injury has, as an element, the use of physical force. Both conflicts warrant this Court's review.

1. The courts of appeals are divided on the degree of force necessary to conclude that a crime has, as an element, the use of "physical force" for purposes of qualifying as a "misdemeanor crime of domestic violence" under Section 922(g)(9). Before this Court's decision in *Johnson*, a circuit split already existed. The First, Eighth, and Eleventh Circuits held that Section 922(g)(9) covers "crimes characterized by the application of *any* physical force." *Nason*, 269 F.3d at 18 (1st Cir.); see *United States* v. *Smith*, 171 F.3d 617, 621 & n.2 (8th Cir. 1999); *United States* v. *Griffith*, 455 F.3d 1339, 1343-1345 (11th Cir. 2006), cert. denied, 549 U.S. 1343 (2007). The Ninth and Tenth Circuits, on the other hand, held that Section 922(g)(9) only covers crimes that involve "the violent use of force against the body of another individual." *United States* v. *Belless*, 338 F.3d 1063, 1068 (9th Cir. 2003); see *United States* v. *Hays*, 526 F.3d 674, 677-681 (10th Cir. 2008); cf. *Flores* v. *Ash-*

croft, 350 F.3d 666, 670-672 (7th Cir. 2003) (holding that force must "be violent in nature" in the context of defining a "crime[] of domestic violence" under 8 U.S.C. 1227(a)(2)(E)).

That same conflict was invoked in the petition for a writ of certiorari in *Johnson*. See Pet. at 18-21, *Johnson*, *supra*. And, as the government explained, the "interpretive question" presented in *Johnson* had arisen "primarily in cases" involving the "misdemeanor crime of domestic violence" definition. U.S. Br. at 10, 37, *Johnson*, *supra*. The Court, however, declined to resolve that issue—and the conflict remains. See *Johnson*, 130 S. Ct. at 1273 ("We do not decide that the phrase [has "as an element, the use or attempted use of physical force"] has the same meaning in the context of defining a *misdemeanor* crime of domestic violence" because that "issue is not before us.").

After the Court's decision in *Johnson*, the conflict among the courts of appeals has deepened. In *United States* v. *White*, 606 F.3d 144 (2010), the Fourth Circuit, aligning itself with the Ninth and Tenth Circuits, concluded that "the same meaning of 'physical force' adopted" in *Johnson*, *i.e.*, "*violent* force—that is, force capable of causing physical pain or injury to another person," applies to the definition of "misdemeanor crime of domestic violence" under Section 922(g)(9). *Id.* at 153 (quoting *Johnson*, 130 S. Ct. at 1271). In this case, the Sixth Circuit agreed with the Fourth Circuit. See App., *infra*, 8a-10a. The government sought en banc review in both cases, but the courts declined to reconsider their position. And the First Circuit recently reaffirmed its conflicting decision in *Nason*. See *United States* v. *Armstrong*, 706 F.3d 1, 5-6 (1st Cir. 2013), petition for cert. pending, No. 12-10209 (filed May 6, 2013); cf. *Unit-*

ed States v. *Booker*, 644 F.3d 12, 17-18 (1st Cir. 2011) (rejecting argument that *Nason* is no longer good law after *Johnson*), cert. denied, 132 S. Ct. 1538 (2012). Accordingly, at least seven circuits have now weighed in on this precise issue and they have reached different conclusions. That division of authority is unlikely to be resolved without this Court's intervention.

2. The courts of appeals are also divided on whether bodily-injury assault satisfies the use-of-force element in Section 921(a)(33)(A)(ii). The First and Eighth Circuits have held that bodily-injury assault necessarily involves the use of physical force within the meaning of Section 921(a)(33)(A)(ii). See *Nason*, 269 F.3d at 12, 20; *Smith*, 171 F.3d at 620-621. The Sixth Circuit in this case disagreed, joining the Fifth Circuit in holding that assault by causing bodily injury does not necessarily involve the use of physical force and, thus, does not categorically qualify as a misdemeanor crime of domestic violence. See App., *infra*, 15a-17a; *United States* v. *Hagen*, 349 Fed. Appx. 896 (5th Cir. 2009), cert. denied, 131 S. Ct. 457 (2010). The government sought en banc review in both cases, but the courts declined to reconsider their position.

Other courts of appeals have considered the same issue in the context of other statutes that require a use-of-force element and they too have reached different conclusions. For example, the Seventh Circuit recently reaffirmed prior circuit precedent, holding that a "domestic-battery conviction for causing bodily harm to a family member" constitutes a "crime of violence" under 18 U.S.C. 16(a) because it necessarily "entails physical force." *De Leon Castellanos* v. *Holder*, 652 F.3d 762, 764-767 (7th Cir. 2011); see *Hill* v. *Werlinger*, 695 F.3d 644, 649-650 (7th Cir. 2012) (holding the same with respect to the "violent felony" definition under 18 U.S.C. 924(e)(2)(B)(i), and citing cases). Several other courts of appeals have held that assault or battery by intentionally causing bodily injury to another "does not necessarily involve the use of force" because a defendant could be convicted "for injury caused not by physical force, but by guile, deception, or even deliberate omission." *Chrzanoski* v. *Ashcroft*, 327 F.3d 188, 194-196 (2d Cir. 2003) ("crime of violence" definition under 18 U.S.C. 16(a)); see *Villegas-Hernandez*, 468 F.3d at 878-883 (5th Cir.) (same); *Perez-Vargas*, 414 F.3d at 1285-1287 (10th Cir.) ("crime of violence" definition under Sentencing Guidelines § 2L1.2, comment. (1(B)(iii))). Accordingly, at least seven courts of appeals have weighed in on this issue as well, and they too have reached different conclusions. This Court's intervention is also needed to resolve that distinct, but related, issue.[9]

C. The Question Presented Is Of Recurring Importance

Review is warranted because both conflicts raise issues of recurring importance in federal prosecutions and in the administration of a significant federal law.

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[9] In 2010, the United States filed a petition for a writ of certiorari raising this same question and the Court denied review. See *United States* v. *Hagen*, 131 S. Ct. 457 (2010). This case presents a stronger candidate for several reasons. The *Hagen* petition did not present the question left open in *Johnson* (*i.e.*, whether the phrase "physical force" has the same meaning in the context of Section 922(g)(9)'s definition of "misdemeanor crime of domestic violence"). See Pet. at 12 n.4, *Hagen*, *supra*; Reply Br. at 9 n.2, *Hagen*, *supra*. That distinct (but related) question is squarely presented here and it is one on which the courts of appeals remain divided. Moreover, the Sixth Circuit's decision in this case deepens the preexisting circuit conflict. And whereas *Hagen* was decided in a brief, unpublished per curiam opinion, the Sixth Circuit's decision here is published, detailed, and fractured.

1. Congress enacted Section 922(g)(9) to provide a nationwide solution to what it regarded as a nationwide problem: the possession of firearms by those convicted of violent crimes against their families. *Hayes*, 555 U.S. at 426. When Congress enacted Section 922(g)(9) in 1996, "domestic abusers were (and are) routinely prosecuted under generally applicable assault or battery laws." *Id.* at 427. Many States, following the Model Penal Code's approach, define the crime of assault as the unlawful causation of bodily injury. See Model Penal Code § 211.1(1) (1985), 10A U.L.A. 387 (2001); see also, *e.g.*, Conn. Gen. Stat. Ann. § 53a-61(a) (West 2012); Del. Code Ann. tit. 11, § 611 (2007). And many more States, following the common-law approach, define assault or battery as involving either the causation of bodily injury or offensive physical contact. See, *e.g.*, Fla. Stat. Ann. § 784.03(1)(a) (West 2007); 720 Ill. Comp. Stat. Ann. 5/12-3(a) (West Supp. 2013). As a consequence, in much of the country, offensive physical contact, the causation of bodily injury, or both, without more, is punishable as simple assault or battery.

If, as the court of appeals held, an element of "violent" force is required for a conviction to qualify as a "misdemeanor crime of domestic violence," then Section 922(g)(9) likely will have no application to many persons convicted under such offensive physical contact statutes. And if, as the court of appeals also held, bodily-injury assault does not have the requisite use-of-force element, then Section 922(g)(9) will be largely inapplicable to many persons convicted under such injury-focused statutes. Because most assault or battery statutes require *either* offensive touching *or* some form of bodily injury, Section 922(g)(9) would be rendered largely inoperative.

Congress could not have intended that result. See *Hayes*, 555 U.S. at 426-427 (rejecting an interpretation of Section 921(a)(33)(A) that would have rendered Section 922(g)(9) "'a dead letter' in some two-thirds of the States from the very moment of its enactment") (citation omitted); see also *Nijhawan* v. *Holder*, 557 U.S. 29, 40 (2009) (rejecting a reading of 8 U.S.C. 1101(a)(43)(M)(i) that would leave the provision with little application, doubting "Congress would have intended (M)(i) to apply in so limited and so haphazard a manner"); *Taylor*, 495 U.S. at 594 (declining to construe the ACCA's reference to "burglary" as meaning "common-law burglary," explaining that such a construction "would come close to nullifying that term's effect in the statute, because few of the crimes now generally recognized as burglaries would fall within the common-law definition"). This Court's review is warranted to forestall that dramatic curtailment of the statute.

2. The conflicts among the circuits are likely to be a source of confusion for law enforcement and defendants alike. Defendants with convictions like respondent's may not be subject to federal prosecution for possession of firearms when they live in the jurisdictions of the Fifth and Sixth Circuits, and possibly the Second and Tenth Circuits, but they can be prosecuted if they later move to a State within the jurisdictions of the First or Eighth Circuits. And if they move somewhere else, they will be uncertain about their status.

The conflicts will also have an adverse impact on officials reviewing the lawfulness of certain firearms purchases by out-of-state buyers. See 18 U.S.C. 922(s) and (t).[10] Officials will have to consider not only whether the transaction complies with the law of the State in which the transaction occurs, but also whether buyers are permitted to possess firearms under the interpretation of Section 921(a)(33)(A) prevailing in their State of residence—an interpretation that may or may not be consistent with the interpretation prevailing in the State in which the transaction occurs. See 18 U.S.C. 922(a)(3) and (b)(3).

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[10] According to the National Instant Criminal Background Check System (NICS), Section 922(g)(9) has historically been the second

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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most common reason for denying firearms to a prospective purchaser. FBI, *Federal Denials* (Nov. 30, 1998-Apr. 30, 2013), http://www.fbi.gov/about-us/cjis/nics/reports/federal-denials-033113.pdf.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 10-5912

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

JAMES ALVIN CASTLEMAN, DEFENDANT-APPELLEE

Filed: Sept. 19, 2012

OPINION

Before: MOORE, CLAY, and MCKEAGUE, Circuit Judges.

CLAY, Circuit Judge.

The government appeals orders granting Defendant James Castleman's motion to dismiss two counts of his indictment, which charged Castleman with possession of a firearm after conviction for a misdemeanor crime of domestic violence in violation of 18 U.S.C. § 922(g)(9), and denying the government's motion for reconsideration. Because the district court correctly interpreted § 922(g)(9), we **AFFIRM** the district court's judgment.

BACKGROUND

In 2001, Castleman pleaded guilty to one count of misdemeanor domestic assault in violation of Tennessee Code § 39-13-111(b). That statute makes a defendant liable for a misdemeanor if he "commits an assault as defined in § 39-13-111 against a domestic abuse victim." Tenn. Code Ann. § 39-13-111(b). Under § 39-13-101, a person is guilty of assault if he:

> (1) Intentionally, knowingly or recklessly causes bodily injury to another;
>
> (2) Intentionally or knowingly causes another to reasonably fear imminent bodily injury; or
>
> (3) Intentionally or knowingly causes physical contact with another and a reasonable person would regard the contact as extremely offensive or provocative.

Tenn. Code Ann. § 39-13-101. Castleman's 2001 indictment asserted that he "did intentionally or knowingly cause bodily injury to [the mother of his child]" in violation of § 39-13-111(b), to which he pleaded guilty on July 16, 2001.

Seven years later, federal agents discovered that Castleman and his wife were buying firearms from dealers and selling them on the black market. Under the Castlemans' scheme, Castleman's wife purchased firearms, allegedly lied on federal firearms paperwork by stating that she was the actual buyer of the firearms, and turned the firearms over to her husband, who was legally prohibited from purchasing firearms because of his domestic assault conviction. One of the firearms Castleman's wife allegedly purchased was recovered in a homicide investigation in Chicago, Illinois. An investigation by the Bureau of Alcohol, Tobacco, Firearms & Explosives led agents to the Castlemans.

A grand jury indicted Castleman on two counts of possession of a firearm after being "convicted . . . of a misdemeanor crime of domestic violence," in violation of 18 U.S.C. § 922(g)(9). Section 922(g)(9) states that:

> It shall be unlawful for any person . . . who has been convicted in any court of a *misdemeanor crime of domestic violence* . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. § 922(g)(9) (emphasis added). Section 921(a)(33)(A) of Title 18 defines a "misdemeanor crime of domestic violence" to include any offense that:

> (i) is a misdemeanor under Federal, State, or Tribal law; and
>
> (ii) has, *as an element, the use or attempted use of physical force*, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim[.]

18 U.S.C. § 921(a)(33)(A) (emphasis added).

On April 30, 2010, the district court dismissed the § 922(g)(9) counts in Castleman's indictment, reasoning that Castleman's misdemeanor domestic assault conviction did not qualify as a domestic violence crime requiring the "use or attempted use of physical force" as defined in 18 U.S.C. § 921(a)(33)(A)(ii). Drawing upon cases from some of our sister circuits, the district court read § 921(a)(33)(A)(ii) to require "force in the sense of violent contact" instead of merely "force as a scientific concept relating to the movement of matter." (Order 5, R. 108.) In adopting that construction of § 922(g)(9), the district court rejected the construction adopted by other circuits and urged by the government, under which a domestic assault conviction resulting from "subtle and indirect uses of physical force" would permit liability under § 922(g)(9). (Gov't Br. 18.) Reasoning that Tennessee Code § 39-13-111(b)(1) would permit a conviction for assaultive conduct not involving physical contact, the court concluded that Castleman's conviction did not qualify as a predicate offense for purposes of § 922(g)(9). The government moved for reconsideration, which the district court denied, and then timely appealed.

DISCUSSION

I. Legal Framework

We review *de novo* a district court's decision of whether a prior conviction qualifies as a predicate offense under 18 U.S.C. § 922(g)(9). *See United States v. Gross*, 662 F.3d 393, 406 (6th Cir. 2011). In order to determine whether a conviction qualifies as a § 922(g)(9) predicate offense, we apply the "categorical approach" from *Taylor v. United States*, 495 U.S. 575, 600, 110 S. Ct. 2143, 109 L. Ed. 2d 607 (1990), in which we "look[ ] to the statutory definition of the offense and not the particular facts underlying the conviction." *United States v. Gibbs*, 626 F.3d 344, 352 (6th Cir. 2010); *see United States v. Hays*, 526 F.3d 674, 679 (10th Cir. 2008). If a defendant can violate the statute in a manner that involves the use or attempted use of physical force and in a manner that does not, we "may consider the indictment, guilty plea, or similar documents to determine whether they necessarily establish the nature of the prior conviction." *Id.* (citing *Shepard v. United States*, 544 U.S. 13, 26, 125 S. Ct. 1254, 161 L. Ed. 2d 205 (2005)).

II. Construction of 18 U.S.C. §§ 921(a)(33)(A) and 922(g)(9)

Like other federal appellate courts that have applied § 922(g)(9) to prior state convictions, we must determine the degree of force necessary for a misdemeanor domestic battery offense to qualify as a misdemeanor crime of domestic violence. *See, e.g.*, *Hays*, 526 F.3d at 677-79; *United States v. Nason*, 269 F.3d 10, 13-18 (1st Cir. 2001). The government argues that the district court incorrectly minimized the word "misdemeanor" in deciding whether Castleman's domestic assault conviction was "a misdemeanor crime of domestic violence" under § 922(g)(9). The touchstone of the government's argument is that § 922(g)(9)'s reference to misdemeanor domestic violence crimes triggers § 922(g)(9) liability for a defendant convicted of any generic, common-law assault and battery offense that involves no more than slight physical touching. By the government's reckoning, Congress intended § 922(g)(9) to reach the typical common law assault or battery offense, which generally permits liability for causing bodily injury "by subtle and indirect uses of physical force." (Gov't Br. 18.)

The government's argument is one of statutory interpretation. In construing § 922(g)(9), we seek Congress' intent and refer first to the statute's plain language. *Chrysler Corp. v. C.I.R.*, 436 F.3d 644, 654 (6th Cir. 2006); *Herman v. Fabri-Centers of Amer., Inc.*, 308 F.3d 580, 585 (6th Cir. 2002). We look to the statute's plain language with "the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Discount Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 549 (6th Cir. 2012) (quoting *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194, 105 S. Ct. 658, 83 L. Ed. 2d 582 (1985)). We presume every word or phrase in the statute has independent effect. *See, e.g., United States v. Perry*, 360 F.3d 519, 537 (6th Cir. 2004). If the statute is clear as written, the plain language is both our starting and ending point, making it unnecessary to delve into the statute's legislative history. *United States v. Douglas*, 634 F.3d 852, 858 (6th Cir. 2011).

The government's argument is unpersuasive. It overlooks the nearly identical language of § 921(a)(33)(A) and 18 U.S.C. §§ 16(a) and 924(e)(2)(B)(i). Section 921(a)(33)(A)(ii) defines a "misdemeanor crime of domestic violence" as a crime that "has, as an element, the use or attempted use of physical force," against a victim with whom the defendant shares a domestic relationship.[1] Like § 921(a)(33)(A)(ii), §§ 16(a) and 924(e)(2)(B)(i) use the phrase "physical force" to define "crime of violence" and "violent felony," respectively. Section 16(a) defines a "crime of violence" in part as "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another." For its part, § 924(e)(2)(B)(i) defines a "violent felony" in part as a crime "that has as an element the use, attempted use, or threatened use of physical force." By defining a "misdemeanor crime of domestic violence" to require "the use or attempted use of physical force," § 921(a)(33)(A)(ii) drops the reference to "threatened use" from §§ 16(a) and 924(e)(2)(B)(i) but otherwise tracks the language of §§ 16(a) and 924(e)(2)(B)(i). The provisions' similarity supports the inference that Congress intended them to capture offenses criminalizing identical degrees of force.

That inference gains strength in light of the order in which Congress adopted the statutes. Congress adopted §§ 921(a)(33)(A)(ii) and 922(g)(9) over a decade after it codified the "use of physical force" provisions in §§ 16(a) and 924(e)(2)(B)(i), and, as we explained above, Congress used nearly identical language. *See* Pub. L. No. 104-208, § 101(f), 110 Stat. 3009-369, 3009-372 (1996); Pub. L. No. 99-308, § 102, 100 Stat. 451 (1986); Pub. L. No. 98-473, § 1001(a), 98 Stat. 2136 (1984). We consider a statute with language modeled on that of an earlier statute to function as a legislative interpretation of the statute in question, and give the earlier statute "great weight in resolving any ambiguities and doubts" in the later one. *Beckert v. Our Lady of Angels Apartments, Inc.*, 192 F.3d 601, 606 (6th Cir. 1999) (quoting *United States v. Stewart*, 311 U.S. 60, 64-65, 61 S. Ct. 102, 85 L. Ed. 40 (1940)).

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[1] Unlike § 924(e)(2)(B), § 921(a)(33)(A)(ii) does not contain a clause listing particular common law violent felonies ("burglary, arson, or extortion") or a residual clause ("otherwise involves conduct that presents a serious potential risk of physical injury to another"). Therefore, cases construing the residual clause in § 924(e)(2)(B)(ii) do not inform this appeal. *See Sykes v. United States*, —U.S.—, 131 S. Ct. 2267, 180 L. Ed. 2d 60 (2011); *United States v. Vanhook*, 640 F.3d 706 (6th Cir. 2011).

The Fourth Circuit recently came to the same conclusion in *United States v. White*, 606 F.3d 144, 153 (4th Cir. 2010). In *White*, the Fourth Circuit held that a Virginia domestic assault and battery statute is not a "misdemeanor crime of domestic violence" for purposes of § 921(a)(33)(A)(ii). *See id.* As a basis for its decision, the court relied on *Johnson v. United States*, —U.S.—, 130 S. Ct. 1265, 176 L. Ed. 2d 1 (2010). In *Johnson*, the Supreme Court held that a Florida battery statute that criminalized intentional striking, touching, and causing of bodily harm to another person was not a "violent felony" for purposes of § 924(e)(2)(B)(i). *Johnson*, 130 S. Ct. at 1269, 1273-74. In so holding, the Court interpreted the "physical force" requirement in that statute as "*violent* force . . . capable of causing physical pain or injury to another person" and "strong physical force." *Id.* at 1271.

The *White* court found *Johnson's* reasoning in regard to § 924(e)(2)(B)(i) "compelling if not overwhelming" in its application to § 921(a)(33)(A)(ii). *White*, 606 F.3d at 153. The court explained that it saw "little, if any, distinction between the 'physical force' element in a 'crime of violence' in § 16 under *Leocal* [*v. Ashcroft*, 543 U.S. 1, 9, 125 S. Ct. 377, 160 L. Ed. 2d 271 (2004)], a 'violent felony' under § 924(e) in *Johnson* and a 'misdemeanor crime of domestic violence' in § 922(g)(9)." *Id.* In the court's opinion, there was "no principled basis upon which to say a 'crime of domestic *violence*' would include *nonviolent* force such as offensive touching in a common law battery." *Id.* *White* is consistent with cases from other circuits concluding that a common-law, offensive-touching battery statute does not require sufficient force to be a misdemeanor crime of domestic violence. *See Hays*, 526 F.3d at 679 (holding that a Wyoming domestic battery statute that criminalized unlawful touching "in a rude, insolent, or angry manner" requires insufficient force to constitute a misdemeanor crime of domestic violence); *United States v. Belless*, 338 F.3d 1063, 1068 (9th Cir. 2003) (holding the same regarding the same Wyoming statute). We agree with these courts that the "physical force" provision of § 921(a)(33)(A)(ii) is identical to § 924(e)(2)(B)(i) in the degree of force it requires in a qualifying predicate offense.[2] And as a result, we conclude that the degree of force *Johnson* requires for a conviction under § 924(e)(2)(B)(i) is required of a misdemeanor crime of domestic violence.

The dissent finds fault in our decision to construe §§ 921(a)(33)(A)(ii) and 922(g)(9) in light of §§ 16(a) and 924(e)(2)(B)(i), and *Johnson*'s gloss on the latter statutes, because *Johnson* postdated the adoption of all the statutes in question. But this line of reason is hardly novel. For example, the Supreme Court used the identical line of argument in *Smith v. City of Jackson*, 544 U.S. 228, 234-38, 125 S. Ct. 1536, 161 L. Ed. 2d 410 (2005) (plurality opinion), in which the Court held that disparate-impact claims are available under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 623, based in part on its previous interpretation of Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-2. Congress adopted Title VII in 1964, and it adopted the ADEA in 1967. *See Smith*, 544 U.S. at 233, 125 S. Ct. 1536. Four years after Congress adopted the ADEA, the Supreme Court held in *Griggs v. Duke Power Company*, 401 U.S. 424, 433-34, 91 S. Ct. 849, 28 L. Ed. 2d 158 (1971), that Title VII authorizes claims of employment discrimination based on race even when a plaintiff cannot show that the defendant employer acted with a discriminatory intent. A majority of the Court explained that *Griggs* was "a precedent of compelling importance" when the Court considered the same issue with respect to the ADEA in 2005. *Smith*, 544 U.S. at 234, 125 S. Ct. 1536 (plurality opinion); *see id.* at 243, 125 S. Ct. 1536 (Scalia, J., concurring opinion) (expressing agreement with "all of the Court's reasoning" but finding the issue better left for agency interpretation). The Court's reasoning was consistent with its reading of Title VII and the ADEA in other cases. *See Smith*, 544 U.S. at 234 n.4, 125 S. Ct. 1536 (citing *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 756, 99 S. Ct. 2066, 60 L. Ed. 2d 609 (1979), *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 416, 105 S. Ct. 2743, 86 L. Ed. 2d 321 (1985), and *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121, 105 S. Ct. 613, 83 L. Ed. 2d 523 (1985)).

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[2] We also note that other federal courts have come to the opposite conclusion and held that an offense requiring only slight touching can qualify as a misdemeanor crime of domestic violence. *See United States v. Griffith*, 455 F.3d 1339, 1342 (11th Cir. 2006); *Nason*, 269 F.3d at 20.

As *Smith* makes clear, the Supreme Court (or other federal courts) need not have answered a particular question about a statute's meaning for the court to conclude that a construction of an earlier-adopted statute is "a precedent of compelling importance" to the interpretation of an identical, later-adopted statute. *Id.* at 234, 125 S. Ct. 1536. Therefore, our argument is obviously not that Congress knew about *Johnson* when it adopted § 922(g)(9). Rather, the governing principle holds that Congress' decision to use identical language in writing the two statutes demonstrates its belief that the statutes share a similar meaning and, therefore, should be interpreted similarly. As we explained, that principle is not foreign to this Court. *See, e.g., United States v. Mc-*

Auliffe, 490 F.3d 526, 532 n. 3 (6th Cir. 2007); *Beckert*, 192 F.3d at 606.

The government resists this conclusion by emphasizing § 922(g)(9)'s reference to "misdemeanor" offenses, but the government asks us to put more weight on the term "misdemeanor" than Congress meant the term to bear. Had Congress intended the word "misdemeanor" to have the effect suggested by the government, then Congress would have had no need to modify "misdemeanor" with the phrase "crime of violence." Congress could simply have prohibited any person convicted of a "misdemeanor domestic assault or battery offense" from possessing a firearm. It chose not to do so.

Additionally, as the Supreme Court has explained in a different doctrinal context, the term "misdemeanor" "meant very different things in different common-law contexts" and was not defined in reference to the degree of force a misdemeanor offense required. *Atwater v. Lago Vista*, 532 U.S. 318, 328 n.2, 121 S. Ct. 1536, 149 L. Ed. 2d 549 (2001). "Misdemeanor" has an independent meaning in the statute, but it has a different meaning than the government suggests. *See Perry*, 360 F.3d at 537. "Misdemeanor crime of domestic violence" is most naturally interpreted to mean any crime requiring strong and violent physical force, which happens to be a misdemeanor. Under this formulation, a misdemeanor crime of domestic violence is part of a subset of misdemeanor offenses which does not include all assault and battery offenses, but rather only those assault and battery offenses in which violent physical force is involved. The most natural inference from this reading is that Congress aimed to extend § 922(g)(9) to reach individuals who committed violent domestic conduct but who were charged only with a misdemeanor, perhaps as a result of a plea agreement.[3]

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[3] In *Johnson*, the Supreme Court concluded that a battery offense was not a "violent felony," in part because the Court found it "unlikely that Congress would select a term of art defining 'violent felony' a phrase that the common law gave peculiar meaning only in its definition of a misdemeanor." 130 S. Ct. at 1271-72. According to government, this statement implies that the Court understands § 922(g)(9), with its limitation to "misdemeanor" offenses, to encompass all misdemeanor offenses attaching criminal liability to an offensive touching. The government reads the Court's statement to establish a broader proposition than it was intended. The Court's reference to the word "misdemeanor" was not aimed to demonstrate that a misdemeanor offense requiring less than violent force would trigger § 922(g)(9). Rather, the reference was aimed strictly to demonstrate why Congress would not use the word "felony" if it intended to cast liability to include an offense traditionally categorized as a misdemeanor. We do not read the Court's statement as an intended construction of § 922(g)(9).

Insofar as the Court's statement does bear on § 922(g)(9), it supports a proposition that we have applied here. At bottom, *Johnson's* discussion of the common-law heritage of battery offenses reflected the established practice of presuming that Congress intended to incorporate the common-law meaning of a term absent evidence to the contrary. *See Info-Hold v. Sound Merchandising, Inc.*, 538 F.3d 448, 455-56 (6th Cir. 2008). Nothing about our decision transgresses that practice. The government asks us to do more than give due respect to the common-law history of "misdemeanor"; it asks us to read "misdemeanor" to swallow the remainder of § 922(g) and ignore the statute's remaining terms. We decline, because doing so would read the remaining language out of the statute.

The dissent reads our opinion as having underemphasized "the distinction between misdemeanors and felonies in the ACCA" and therefore as unnecessarily applying *Johnson's* degree-of-force requirement to § 922(g)(9). The dissent seems to suggest that our application of *Johnson* to § 922(g)(9) flows from the belief that the distinction between misdemeanor and felony crimes is "insignificant." But the chain of reasoning flows in the opposite direction: any salient distinction between misdemeanors and felonies was, in our view, sufficiently insignificant to Congress that it wrote the statutes identically; thus, it is the similarity of the statutes that prohibits a domestic violence offense's status as a misdemeanor from controlling the question of whether the offense qualifies as a misdemeanor crime of domestic violence.

Nor did *Johnson* treat the misdemeanor-felony distinction in the manner the dissents says it did. Though the Court in *Johnson* declined to use terms associated with misdemeanor offenses to define "violent felony," it does not follow that the passage in question indicates a practice by the Court of incorporating the misdemeanor felony distinction directly into the ACCA and § 922(g)(9). Instead, the relevant portion of *Johnson* suggests that the misdemeanor-felony distinction is not a viable framework for determining the level of violence an offense must require to qualify as a violent felony. *See Johnson*, 130 S. Ct. at 1271 ("[T]he dividing line between misdemeanors and felonies has shifted over time"). The ACCA and § 922(g)(9), by contrast, is concerned with punishing defendants previously convicted of offenses characterized by a high degree of physical violence. And, as the Fourth Circuit explained in *White*, § 922(g)(9)'s reference to misdemeanor offenses "describes the punishment status of the predicate offense and has no bearing on the statutory mandate of a crime of violence." *White*, 606 F.3d at 153.

III. Categorical Analysis

Having determined the degree of force required in a misdemeanor crime of domestic violence, we turn to the question of whether Tennessee Code § 39-13-111(b) categorically qualifies as a misdemeanor crime of domestic violence. *See Gibbs*, 626 F.3d at 352. Our decision in *United States v. McMurray*, 653 F.3d 367 (6th Cir. 2011), requires us to conclude that it does not.

In *McMurray*, we held that a Tennessee aggravated assault conviction did not qualify as a predicate offense for purposes of 18 U.S.C. § 924(e)(2)(B)(i), because the statute criminalizes reckless conduct. 653 F.3d at 376. The *McMurray* defendant had been convicted of violating Tennessee's aggravated assault statute, which incorporates § 39-13-101. *Id.* at 372. We limited our inquiry to whether a conviction under "the serious-bodily-injury prong" of the aggravated assault statute satisfied the "use of physical force" provision in § 924(e)(2)(B)(i). *Id.* at 373. We relied on *Johnson*, 130 S. Ct. at 1270, *Leocal*, 543 U.S. at 9, 125 S. Ct. 377, and *United States v. Portela*, 469 F.3d 496 (6th Cir. 2006), in support of the proposition that a state offense making a defendant liable for "reckless" conduct could not qualify as a predicate offense. *Id.* at 374. Since the Tennessee aggravated assault statute prohibits "recklessly . . . caus[ing] bodily injury to another," we reasoned that the defendant's aggravated assault conviction did not qualify as a violent felony under the "use of physical force" clause of § 924(e)(2)(B)(i). *Id.* at 372, 376; *see also United States v. Anderson*, 695 F.3d 390 (6th Cir. 2012) (concluding that an aggravated assault conviction qualified as a violent felony under § 924(e)(2)(B) where the statute required the defendant to knowingly cause serious physical harm to a victim).

Castleman pleaded guilty to an offense less severe than did the defendant in *McMurray*. Castleman pleaded guilty to misdemeanor domestic assault, for which a defendant is liable if he "commits an assault as defined in § 39-13-101 against a domestic abuse victim." Tenn. Code Ann. § 39-13-111(b). *McMurray* held that the violation of a statute that builds on § 39-13-101 and makes it a crime to cause "serious bodily injury" does not require the use of violent force. It stands to reason, then, that the violation of a statute that also builds on § 39-13-101 but makes it a crime only to cause "bodily injury," serious or not, also does not require the use of violent force. Therefore, a defendant could violate Tennessee Code § 39-13-111(b) both in a manner that constitutes a "misdemeanor crime of domestic violence" and in a manner that does not.

This reasoning is consistent with *United States v. Anderson*, 695 F.3d 390 (6th Cir. 2012), in which we recently decided that a defendant's aggravated assault conviction qualified as a violent felony under

§ 924(e)(2)(B) because the underlying Ohio statute required the defendant to knowingly cause "serious physical harm to another." *Id.* at ¶ 31-32 (quoting Ohio Rev. Code Ann. § 2903.12(A)). Undertaking a categorical analysis of the Ohio statute, we concluded that "only by knowingly using force capable of causing physical pain or injury, *i.e.*, violent physical force," can a defendant cause serious physical injury to a victim. *Id.* at ¶ 32. And reasoning that "[t]he degree of injury has a 'logical relation to the use of physical force,'" our ruling was grounded in the fact that proof of a "serious" physical injury was required to obtain a conviction and, in turn, to qualify the conviction as a violent felony. *Id.* at ¶ 34 (quoting *De Leon Castellanos v. Holder*, 652 F.3d 762, 766 (7th Cir. 2011)).

In this case, by contrast, the statute does not require proof of a serious physical injury. Rather, it requires proof of just some physical injury, regardless of how slight. Castleman could have caused a slight, nonserious physical injury with conduct that cannot be described as violent. Castleman may have been convicted for causing a minor injury such as a paper cut or a stubbed toe, in which he knowingly acted in a manner that caused a domestic relations bodily harm but did so using less than strong physical force. Therefore, Castleman's conviction under Tennessee Code § 39-11-111(b), in which he caused an unspecified bodily injury, is not a misdemeanor crime of domestic violence.

IV. Modified Categorical Analysis

Having concluded that Tennessee Code § 39-13-111(b) is not categorically a misdemeanor crime of domestic violence, we now consider whether Castleman's conviction qualifies as such given the proof of his conduct available to us. *Gibbs*, 626 F.3d at 352. Among the *Shepard* documents we are able to consider in making this inquiry is the indictment to which Castleman pleaded guilty. *Id.* (citing *Shepard*, 544 U.S. at 26, 125 S. Ct. 1254). Castleman's indictment states tersely that he "did intentionally or knowingly cause bodily injury" to a woman with whom he had a domestic relationship in violation of § 39-13-111(b). The indictment does not specify the type of injury Castleman caused or its severity. The logic applicable to the categorical analysis of Castleman's conviction applies here as well, because Castleman's indictment adopts the language of the statute and does not specify the type or severity of injury he caused.

The government argues that it was impossible for Castleman to cause his victim any bodily injury without using the degree of force required under § 921(a)(33)(A)(ii). That argument is unpersuasive inasmuch as an individual can cause an unspecified bodily injury with nonviolent physical force. Tennessee law supports this proposition. Tennessee law defines "bodily injury" to include "a cut, abrasion, bruise, burn or disfigurement, physical pain or temporary illness or impairment of the function of a bodily member, organ or mental faculty." Tenn. Code Ann.

§ 39-11-106(a)(2). A defendant himself need not necessarily use "*violent*" and "strong physical force" to cause a cut, an abrasion, or a bruise. *Johnson*, 130 S. Ct. at 1270. Rather, a defendant can cause one of these injuries with nonviolent force that either causes a slight injury or exposes the victim to bodily injury. As we explained, Castleman may have been convicted for causing a minor, nonserious physical injury, in which he caused the individual with whom he had a domestic relationship bodily harm, but did so using less than strong physical force. Therefore, Castleman's indictment does not provide a basis from which we can conclude that his domestic assault conviction entailed violent physical force.

Our decision is consistent with *United States v. Alexander*, 543 F.3d 819 (6th Cir. 2008), which the government incorrectly argues is in conflict with our conclusion regarding Castleman's domestic assault conviction. In *Alexander*, we held that a defendant's Michigan conviction for assaulting a police officer was a crime of violence for purposes of USSG § 4B1.2(a), in part because the statute required proof that the defendant caused the officer bodily injury. *Id.* at 823; *see McMurray*, 653 F.3d at 371 n.1 (explaining that USSG § 4B1.2(a) and § 924(e)(2)(B) are applied in conjunction with one another).

The government overlooks three important distinctions between *Alexander* and this case. First, we decided *Alexander* before the Supreme Court decided *Johnson*, so we must look to *Johnson* in deciding whether an offense requires the use or attempted use of physical force. Second, the Michigan statute at issue in *Alexander* required the government to prove that the defendant caused an officer a bodily injury "requiring medical attention or medical care." *Id.* (quoting M.C.L.A. § 750.81d(2)). Indeed, our conclusion that the defendant's crime was a violent felony was largely grounded on the fact that the conviction "require[d] causing an *actual* physical injury sufficiently severe to require medical care." *Id.* By contrast, Castleman may have pleaded guilty for doing no more than swatting or scratching the victim, *see State v. Wachtel*, No. M2003-00505-CCA-R3-CD, 2004 WL 784865, at *12 (Tenn. Ct. Crim. App. Apr. 13, 2004), and causing no more than a cut, abrasion, or bruise, none of which would have required medical care. Tenn. Code Ann. § 39-11-106(a)(2). Third, in *Alexander* we considered the defendant's conviction on plain error review and could have only reversed the district court's judgment upon a finding of an obvious error that adversely affected both the defendant's substantial rights and the reputation and integrity of the judiciary. *See id.* at 822 (quoting *United States v. Koeberlein*, 161 F.3d 946, 949 (6th Cir. 1998)). Here, by contrast, we undertake *de novo* review and agree with the district court's judgment. Therefore, even after *Johnson*, our decision is consistent with *Alexander*.

CONCLUSION

For the foregoing reasons, we **AFFIRM** the district court's judgment.

KAREN NELSON MOORE, Circuit Judge, concurring.

Although I agree with the majority's construction of 18 U.S.C. §§ 921(a)(33)(A) and 922(g)(9), and the decision to affirm the district court's judgment, I write separately to address the application of the modified-categorical-analysis. I agree that the force requirement for a misdemeanor crime of domestic violence is identical to that specified under the crime-of-violence statute and the ACCA. In light of that conclusion, I believe this case presents a straightforward application of the Supreme Court's opinion in *Johnson v. United States*, —U.S.—, 130 S. Ct. 1265, 176 L. Ed. 2d 1 (2010), and of our subsequent decision in *United States v. McMurray*, 653 F.3d 367 (6th Cir. 2011). In my view, this application also eschews drawing unnecessary comparisons between the seriousness of certain domestic-violence offenses and injuries.

At bottom, *McMurray* involved the same assault statute underlying the domestic-violence offense at issue here, which prohibits "[i]ntentionally, knowingly or recklessly caus[ing] bodily injury to another." Tenn. Code Ann. § 39-13-111; *see also McMurray*, 653 F.3d at 372. Because that statute criminalizes reckless conduct, it is not subject to the categorical approach. *McMurray*, 653 F.3d at 375. Thus, the question is whether Castleman, whose guilty plea was confined to "intentionally or knowingly caus[ing] bodily injury" to the mother of his child, R. 109-1 (State Ct.

Indictment), meets the "use or attempted use of physical force" requirement for a misdemeanor crime of domestic violence under the modified-categorical approach. *See* 18 U.S.C. 921(a)(33)(A).

Although some Sixth Circuit cases, such as *United States v. Alexander*, 543 F.3d 819, 823 (6th Cir. 2008), suggest that a bodily-injury requirement alone could be enough to qualify a statute as a crime of violence, this results-oriented approach does not square with the Supreme Court's analytical approach to the physical-force requirement for a violent felony. In *Johnson*, the Court rejected the notion that "*any* intentional physical contact, no matter how slight" could qualify as a violent felony. 130 S. Ct. at 1270 (internal quotation marks omitted). Instead, the Supreme Court defined 'physical force' as "*violent* force—that is, force *capable of causing* physical pain or injury to another person." *Id.* at 1271 (second emphasis added). It further noted that the term "'violent' . . . connotes a substantial degree of force." *Id.* Following this analysis, it is not enough to look only at the *result* of the defendant's conduct; instead, the focus must be on the nature of the force proscribed by the statute and whether the *conduct itself* necessarily involves violent force.

Applying this standard to the Tennessee assault statute, we have questioned whether an element specifying that a defendant "'cause[ ] serious bodily injury' necessarily requires the 'use of physical force'" for purposes of the ACCA. *McMurray*, 653 F.3d at 374 n.6 (internal citations omitted). Indeed, as we recognized in *McMurray*, the Tennessee assault statute "does not define 'serious bodily injury' to require any particular degree of contact." *Id.* Thus, "[a]lthough we might expect that someone who causes serious bodily injury to another did so with a strong physical force, the statute does not require it." *Id.* (alteration in original); *cf. United States v. Villegas-Hernandez*, 468 F.3d 874, 879 (5th Cir. 2006) (evaluating a comparable bodily-injury requirement, which encompassed causing pain, illness, or physical impairment, and concluding that such injuries "could result from any of a number of acts [performed] without use of 'destructive or violent force'"), *cert. denied*, 549 U.S. 1245, 127 S. Ct. 1351, 167 L. Ed. 2d 144 (2007). By extension, the requisite force under Tennessee's domestic-violence statute is similarly unspecified, and thus, even the modified-categorical approach does not bring Castleman's conviction within the confines of a misdemeanor crime of domestic violence.

MCKEAGUE, Circuit Judge, dissenting.

The majority relies upon *United States v. McMurray*, 653 F.3d 367 (6th Cir. 2011) to determine that Tennessee's assault statute does not have use or attempted use of physical force as an element. I dissented in *McMurray* because it was contrary to binding precedent. Likewise, I disagree with the outcome today for the reasons outlined in my *McMurray* dissent and established further below. I am bound to follow *McMurray* insofar as it is controlling. However, unlike the majority, I do not believe that *McMurray* controls the outcome in this case and I dissent insofar as the majority attempts to extend *McMurray's* reach.

I.

The majority finds the distinction between misdemeanors and felonies in the ACCA insignificant. In doing so, the majority ignores the fact that the Supreme Court's violent felony exception to the normal common law interpretation of "physical force" in *Johnson v. United States*, —U.S.—, 130 S. Ct. 1265, 176 L. Ed. 2d 1 (2010), was based on precisely that distinction.

In *Johnson*, the Supreme Court determined that the physical force element of the "violent felony" definition in the ACCA was not satisfied by mere offensive touching. Instead the Court interpreted the statute to require violent physical force. Here, the majority takes *Johnson's* "violent felony" standard and applies it to the ACCA's "misdemeanor crime of domestic violence" found at 18 U.S.C. § 921(a)(33)(A). In so doing, the majority misinterprets *Johnson*.

The *Johnson* Court held that "although a common-law term of art should be given its established common-law meaning," *Johnson*, 130 S. Ct. at 1270, the common law definition of "physical force" does not apply to violent felonies. This is because "context determines meaning and we do not force term-of-art definitions into contexts where they plainly do not fit and produce nonsense. Here we are interpreting the phrase 'physical force' as used in defining not the crime of battery, but rather the statutory category of 'violent felon[ies]'" *Id.* (internal citations omitted).

However, the Court specifically stated that its holding did not apply to § 921(a)(33)(A): "We have interpreted the phrase 'physical force' only in the context of a statutory definition of "violent felony." We do not decide that the phrase has the same meaning in the context of defining a *misdemeanor* crime of domestic violence." *Id.* at 1273 (emphasis in original).

Just as using the mere touching misdemeanor standard of physical force to define violent felonies is misplaced and produces nonsense, so too does using the felony exception to define a misdemeanor. This creates an exception that swallows the rule. Several of our sister circuits have already recognized this. *See United States v. Griffith*, 455 F.3d 1339, 1345 (11th Cir. 2006) ("we do not feel compelled to reach a result at war with common sense"); *United States v. Booker*, 644 F.3d 12, 20-21 (1st Cir. 2011) *cert. denied*, —U.S.—, 132 S. Ct. 1538, 182 L. Ed. 2d 175 (2012) ("There are sound reasons to decline to interpret the two statutes in tandem . . . the statutes address significantly different threats. Whereas the ACCA seeks to protect society at large from a diffuse risk of injury or fatality at the hands of armed, recidivist felons, § 922(g)(9) addresses an acute risk to an identifiable class of victims—those in a relationship with a perpetrator of domestic violence."). Although, as the majority points out, there are circuits which have adopted the *Johnson* felony standard for the misdemeanor provision, they err for the same reasons the majority errs today.

The majority supports its application of *Johnson* by noting that the ACCA's misdemeanor language at § 921(a)(33)(A) mirrors its violent felony language. However, the *Johnson* exception was not clarified until after both statutes were adopted. Despite its extended explanation, the majority thus pretends that Congress acted with full knowledge of the *Johnson* felony exception instead of with the common law understanding when writing § 921(a)(33)(A). Given the chronology of events, this cannot be the case.

In sum, *Johnson* rejected the argument that the misdemeanor standard should control the felony definition. By extension, the felony standard should not control the misdemeanor. Simply applying the narrow felony exception to the broader class of misdemeanor domestic assaults ignores the distinction central to *Johnson*.

II.

In determining that Tennessee's assault statute categorically lacks an element of "the use or attempted use of physical force," the majority relies exclusively on *McMurray*. As I explained in my dissent there, *McMurray* is out of step with binding precedent in this circuit. And "when a later decision of this court conflicts with one of our prior published decisions, we are still bound by the holding of the earlier case." *Darrah v. City of Oak Park*, 255 F.3d 301, 310 (6th Cir. 2001). I concur with the majority's categorical analysis out of respect for the panel rule. *United States v. Moody*, 206 F.3d 609, 615 (6th Cir. 2000).

Nevertheless, under a modified categorical analysis Castleman's prior domestic assault conviction satisfies the heightened *Johnson* standard and does not run afoul of *McMurray*. Castleman was convicted under Tenn. Code Ann. § 39-13-111 after he pled guilty to "intentionally or knowingly" causing bodily injury to the mother of his child. This Court's holding in *McMurray* "rest[ed] on the Tennessee statute's inclusion of *reckless* conduct," *McMurray*, 653 F.3d at 375 n.6 (emphasis added), and did not address intentionally or knowingly inflicting bodily injury. Today's decision extends *McMurray* from reckless infliction of bodily injury to intentional infliction of bodily injury. This outcome is contrary to our precedent, which holds that violent physical force is a necessary element to intentionally or knowingly inflicting bodily injury. *See United States v. Alexander*, 543 F.3d 819, 823 (6th Cir. 2008).[4]

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[4] *Alexander* involved Michigan's statute regarding assaulting an officer:

> Looking exclusively at the statutory definition of the offense, the plain language of this provision indicates that "causing bodily injury" is an element of the crime as defined by M.C.L.A. § 750.81 d(2). Violating this statute would therefore entail committing a crime of violence because the element of "causing bodily injury" involves both the "use of physical force against the person of another" (U.S.S.G. § 4B1.2(a)(1)) and "conduct that presents a serious potential risk of physical injury to another" (U.S.S.G. § 4B1.2(a)(2)). Indeed, a conviction under M.C.L.A. § 750.81d(2) requires more than simply a "risk" of physical injury; a conviction requires causing an *actual* physical injury sufficiently severe to require medical care. If Alexander was in fact convicted under

The majority distinguishes *Alexander* because the Michigan statute necessitated injury "requiring medical attention or medical care." However, that is not the minimum standard in *Johnson*, which required only "force capable of causing physical pain or injury to another person." *Johnson*, 130 S. Ct. at 1271. Tennessee defines bodily injury as "include[ing] a cut, abrasion, bruise, burn or disfigurement, and physical pain or temporary illness or impairment of the function of a bodily member, organ, or mental faculty." Tenn. Code Ann. § 39-11-106. This by definition meets the *Johnson* standard of "physical pain or injury".

This Court's decision in *United States v. Gloss*, 661 F.3d 317, 318-19 (6th Cir. 2011) *cert. denied*, —U.S.—, 132 S. Ct. 1777, 182 L. Ed. 2d 555 (2012), decided after both *McMurray* and *Johnson*, is also instructive. There this Circuit held that the ACCA standard for violent felony was satisfied by Tennessee's facilitation of armed robbery statute because:

> Any robbery . . . that causes serious bodily injury, falls under the first clause of the definition of violent felony, as it necessarily involves "the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. § 924(e)(2)(B)(i). It makes no difference that the defendant was not the person who committed the

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that statute, he would have necessarily committed a crime of violence.

Alexander, 543 F.3d at 823 (emphasis in original).

> aggravated robbery. *See, e.g., United States v. Brown*, 550 F.3d 724, 729 (8th Cir. 2008). All that matters is that *someone* did so, and that the defendant knowingly provided substantial assistance to that person.

Id. at 319 (emphasis in original) The rule in this Circuit after today's decision is that while the mere facilitation of another's crime resulting in serious bodily injury is necessarily a crime involving physical force, directly causing such bodily injury is not. Under this rule assaulting one's girlfriend does not trigger the ACCA—but providing assistance to a third party who robs one's girlfriend, during which she gets assaulted, does. This defies common sense.

Much of the confusion results from the rewording of common law elements in the Model Penal Code.[5] As the First Circuit observed, the apparent disconnect between the ACCA's focus on the act and the state statute's (like Tennessee's) focus on the result can be rectified once their differing perspectives are taken into account. *See United States v. Nason*, 269 F.3d 10, 19-20 (1st Cir. 2001). Recognizing that Congress's use of common law and the state's adoption of the Model Penal Code both address the same crime makes the ACCA easier to interpret.[6]

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[5] Tennessee's assault statute follows the Model Penal Code, which defines simple assault in part as "attempt[ing] to cause or purposely, knowingly or recklessly causes[ing] bodily injury to another." Model Penal Code § 211.1. Prior to codification Tennessee's common law definition of assault, similar to the ACCA, focused on the act rather than the result. "An assault is an attempt or offer to do a personal violence to another. It is an inchoate violence, with the present means of carrying the intent into effect." *Richels v. State*, 33 Tenn. 606, 608 (1854).

The solution is to hold that knowingly or intentionally causing bodily injury necessitates use of physical force. That would solve the apparent contradiction between *Alexander and Gloss*, which addressed intentional or knowing infliction of bodily injury, and *McMurray*, which was limited to reckless infliction of bodily injury. Other circuits have already adopted this rule. The First Circuit, for example, in evaluating Maine's assault statute (which is almost identical to Tennessee's) has found physical force a necessary element: "Common sense supplies the missing piece of the puzzle: to cause *physical* injury, force necessarily must be *physical* in nature. Accordingly, physical force is a formal element of assault under the bodily injury branch of the Maine statute." *United States v. Nason*, 269 F.3d 10, 20 (1st Cir. 2001) (emphasis in original). This conclusion survived *Johnson*. *United States v. Booker*, 644 F.3d 12, 21 (1st Cir.2011) *cert. denied*, —U.S.—, 132 S. Ct. 1538, 182 L. Ed. 2d 175 (2012). Likewise, the Eighth Circuit found that bodily injury is predicated on physical acts. "Smith was charged . . . for committing an act intended to cause pain, injury, or offensive or insulting physical contact . . . . As such, Smith was charged, and pleaded guilty to, an offense with an element of physical force within the meaning of 18 U.S.C.A. § 921(a)(33)(A)(ii)." *United States v. Smith*, 171 F.3d 617, 621 (8th Cir. 1999).

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[6] "Violent felonies" under the ACCA and "crimes of violence" under the sentencing guidelines are analyzed the same way. *United States v. Gibbs*, 626 F.3d 344, 352 n.6 (6th Cir. 2010); also recognized in *McMurray*, 653 F.3d at 371 n.1. With regard to the sentencing guidelines: "the offense for which the defendant was convicted must fall within the generic definition of that crime, which is found by surveying how the crime is described across jurisdictions, as well as consulting sources such as the Model Penal Code . . . . We have recognized the Model Penal Code definition of aggravated assault as the generic definition for the purpose of deciding whether a crime with that label is a crime of violence, at least in states which have merged the crimes of assault and battery." *United States v. Rede-Mendez*, 680 F.3d 552, 556-57 (6th Cir. 2012) (internal citations omitted). That the Model Penal Code's definition of "aggravated assault" (reflected in Tennessee's statute) is a "violent crime" for purposes of the sentencing guidelines but not—as a result of *McMurray*—a "violent felony" for the ACCA further shows that *McMurray* is out of step with this Circuit's larger precedent.

Today's decision separates the Model Penal Code's element of intentionally or knowingly causing bodily injury from the ACCA's element of physical force. This extension of *McMurray* has the effect of making the "misdemeanor crime of domestic violence" provision of the ACCA a dead letter in Tennessee, as well as any other state using the Model Penal Code's definition of assault to punish domestic abusers.

The Supreme Court has already rejected an interpretation of § 921(a)(33)(A) that would make the ACCA a "'dead letter' in some two-thirds of the States from the very beginning." *United States v. Hayes*, 555 U.S. 415, 427, 129 S. Ct. 1079, 172 L. Ed. 2d 816 (2009). In a different context, the Court noted:

> Practical considerations strongly support our reading of § 921(a)(33)(A)'s language. Existing felon-in-possession laws, Congress recognized, were not keeping firearms out of the hands of domestic abusers, because "many people who engage in serious spousal or child abuse ultimately are not charged with or convicted of felonies." 142 Cong. Rec. 22985 (1996) (statement of Sen. Lautenberg). By extending the federal firearm prohibition to persons convicted of "misdemeanor crime[s] of domestic violence," proponents of § 922(g)(9) sought to "close this dangerous loophole."

Id. at 22986.

> Construing § 922(g)(9) to exclude the domestic abuser convicted under a generic use-of-force statute (one that does not designate a domestic relationship as an element of the offense) would frustrate Congress' manifest purpose.

Id. at 426-27, 129 S. Ct. 1079. In *Hayes*, the Court started from the premise that "domestic abusers were (and are) routinely prosecuted under generally applicable assault or battery laws," *Id.* at 427, 129 S. Ct. 1079, and sought to interpret § 921(a)(33)(A) in keeping with that custom. The majority fails to take into account this "manifest purpose" of Congress and reopens a dangerous loophole for domestic offenders. The result—that those convicted of intentional domestic assault in Tennessee may still possess firearms—frustrates Congress's manifest purpose in adopting § 921(a)(33)(A).

For these reasons I disagree with the reasoning of the majority today and dissent from the majority's attempt to extend *McMurray's* reach.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

No. 2:08-cr-20420-JPM-cgc

UNITED STATES OF AMERICA, PLAINTIFF

v.

LEISHIA DAWN CASTLEMAN & JAMES ALVIN CASTLEMAN, DEFENDANTS

Filed: Apr. 30, 2010

ORDER DISMISSING COUNTS 4 AND 5 OF THE SUPERSEDING INDICTMENT AGAINST JAMES ALVIN CASTLEMAN

This matter is before the Court on Defendant James Alvin Castleman's ("Defendant") Second Motion to Dismiss (Docket Entry ("D.E.") 102), filed April 7, 2010. The United States responded in opposition on April 14, 2010. (D.E. 106.) Defendant filed a reply on April 21, 2010. (D.E. 107.)

Defendant's Second Motion to Dismiss has led the Court to reconsider its ruling on Defendant's Motion to

Dismiss Indictment Pursuant to Rule 12(b). For the reasons set forth below, the Court VACATES in part its Order Adopting Report and Recommendation, and GRANTS Defendant's Motion to Dismiss Indictment Pursuant to Rule 12(b). Counts 4 and 5 of the superseding indictment are DISMISSED. Defendant's Second Motion to Dismiss is DENIED as moot.

I. Background

In 2001, Defendant pled guilty to violating Tennessee's domestic assault statute. (United States' Resp. to Def.'s Second Mot. to Dismiss the Indictment Ex. A, Judgment; Ex. B, Guilty Plea.) He is now charged in a five-count indictment with several firearms-related offenses. Counts 4 and 5 of the superseding indictment charge Defendant with possessing a firearm after having been convicted of a misdemeanor crime of domestic violence in violation of 18 U.S.C. § 922(g)(9).[1] Defendant moved to dismiss those counts on September 8, 2009. (D.E. 52.) The Court referred that motion to the Magistrate Judge for report and recommendation on September 8, 2009. (D.E. 54.) On February 4, 2010, The Magistrate Judge recommended denying Defendant's motion. (D.E. 88.) No objections were filed, and the Court adopted the Report and Recommendation on February 22, 2010. (D.E. 90.)

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[1] The other three counts charge Defendant and his wife with making false statements in relation to the purchase of firearms in violation of 18 U.S.C. § 922(a)(6) and 18 U.S.C. § 2.

II. Reconsideration of the Order Adopting Report and Recommendation

"In both civil and criminal cases, a trial court is empowered to revisit any of its previous non-final rulings." *United States v. Reid*, 357 F.3d 574, 580 (6th Cir. 2004). In the Report and Recommendation, the Magistrate Judge recommended applying judicial estoppel against Defendant's argument with regard to whether his 2001 conviction may serve as a § 922(g)(9) predicate offense. After Defendant was indicted in this Court, he brought a successful state collateral challenge to his 2001 conviction. (Def.'s Mot. to Dismiss Indictment Pursuant to Rule 12(b) Ex. A, Carroll County Circuit Court Order.) The Magistrate Judge concluded that Defendant essentially argued to the state court that his 2001 conviction was a § 922(g)(9) predicate offense, and that he should be estopped from arguing the contrary position here.

Upon further review, the Court has determined not to apply the doctrine of judicial estoppel here for several reasons. First, "[t]here is considerable authority that judicial estoppel does not apply in favor of one who was not a party to the prior proceeding in which the inconsistent position was taken." *Nichols v. Scott*, 69 F.3d 1255, 1273 (5th Cir. 1995) (citing numerous authorities). Defendant's prior case was against the State of Tennessee, not the United States. Second, the Court declines to apply the equitable doctrine of judicial estoppel so that a defendant is barred from asserting a dispositive defense to criminal offenses with which he is charged. The Court will consider Defendant's argument that his prior conviction is not a qualifying offense under § 922(g)(9).

III. Standard of Review

The Court must dismiss an indictment where as a matter of law the government cannot prove an element of the offense. *United States v. Ali*, 557 F.3d 715, 719 (6th Cir. 2009) (*citing United States v. Levin*, 973 F.2d 463, 470 (6th Cir. 1992)).

IV. Analysis

18 U.S.C. § 922(g)(9) "prohibits a person previously convicted of 'a misdemeanor crime of domestic violence' from possessing a firearm." *United States v. Beavers*, 206 F.3d 706, 707 (6th Cir. 2000). A misdemeanor crime of domestic violence is defined in relevant part as "an offense that . . . is a misdemeanor under Federal, State or Tribal law[,] and has, as an element, the use or attempted use of physical force"[2] against a victim with whom the offender shares a domestic relationship. 18 U.S.C. § 921(a)(33)(A).

"To determine whether a prior conviction" requires the "use of physical force," the Court "must apply the categorical approach expressed in *Taylor v. United States*, 495 U.S. 575 (1990), and expanded to convictions based on guilty pleas in *Shepard v. United States*, 544 U.S. 13 (2005)." *United States v. Wynn*, 579 F.3d 567, 571 (6th Cir. 2009). Under the categorical approach, the Court "must look only to the fact of conviction and the statutory definition—not the facts underlying the offense—to determine whether that definition supports a conclusion that the conviction was for a crime of violence." *United States v. Bartee*, 529 F.3d 357, 359 (6th Cir. 2008) (*citing* United *States v. Armstead*, 467 F.3d 943, 947 (6th Cir. 2006)).

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[2] The Court will refer to this requirement as the "use of physical force."

a. The "Use of Physical Force" Requirement

There is considerable debate in the courts with regard to when a statute requires the "use of physical force." *See, e.g.*, *United States v. Hays*, 526 F.3d 674, 684 n.5 (10th Cir. 2008) (Ebel, J., dissenting) (describing a purported "three-way circuit split" on the issue). The debate largely centers on the meaning of "physical force" in this context.

Several circuits have recognized a distinction between force in the sense of violent contact and force as a scientific concept relating to the movement of matter. *See Hays*, 526 F.3d at 679 (holding that de minimis touching does not require the "use of physical force," even though such touching involves force as a scientific concept); *Flores v. Ashcroft*, 350 F.3d 666, 672 (7th Cir. 2003) (similar); *United States v. Belless*, 338 F.3d 1063, 1067-68 (9th Cir. 2003) (similar).

Relatedly, the Fifth and Second Circuits have reasoned that an offense does not require the "use of physical force" where the injury may be inflicted by deception rather than through violent contact with the victim. *See United States v. Villegas-Hernandez*, 468 F.3d 874, 878-79 (5th Cir. 2006) (noting that one could violate a Texas assault statute similar to Tennessee's by deceiving the victim into drinking poison); *Chrzanoski v. Ashcroft*, 327 F.3d 188, 195-96 (2d Cir. 2003).

Together these cases stand for the principle that an assault statute does not require the "use of physical force" solely because force in the scientific sense is involved in the offense. The Sixth Circuit has implicitly recognized this principle. That court has repeatedly held that certain sexual assault statutes do not require the "use of physical force," despite the fact that force in the scientific sense is involved in unlawful sexual contact, because the statutes may be violated through coercion or deception.[3] *See United States v. Wynn*, 579 F.3d 567, 572-73 (6th Cir. 2009) (*citing United States v. Mack*, 8 F.3d 1109, 1112 (6th Cir. 1993)); *Arnold*, 58 F.3d at 1121-22.[4]

The United States urges the Court to follow decisions from the Eleventh, First, and Eighth Circuits, holding that various assault statutes have the use "of physical force" element because they require bodily injury or contact with the victim. *See United States v. Griffith*, 455 F.3d 1339, 1342 (11th Cir. 2006); *United States v. Nason*, 269 F.3d 10, 20 (1st Cir. 2001); *United States v. Smith*, 171 F.3d 617, 621 (8th Cir. 1999). The Court finds these decisions unpersuasive. *Nason* and *Smith* contain little analysis on the question of whether the causation of bodily injury necessarily requires the "use of physical force," and the statute in *Griffith* is materially different from Tennessee's assault statute. Further, all three cases are in tension with Sixth Circuit case law.

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[3] The Court declines to draw a distinction between the injuries such as "abrasions" punished by Tennessee's assault statute and the harm a victim of sexual assault suffers.

[4] Neither the United States nor Defendant has addressed *United States v. Alexander*, 543 F.3d 819 (6th Cir. 2008). In that case the court considered a Michigan statute that had an element of "causing a bodily injury requiring medical attention or medical care." 543 F.3d at 823. The *Alexander* opinion briefly and without articulating its reasoning noted that "the element of 'causing bodily injury' involves . . . 'the use of physical force against the person of another' (U.S.S.G. § 4B1.2(a)(1)) . . . . " *Id.* The Court does not read *Alexander* as establishing a general rule that the causation of bodily injury requires the use of physical force in light of both the controversial nature of that question and the Sixth Circuit's sexual assault cases discussed *infra*.

The Court follows the teaching of the Fifth, Second, Tenth, Seventh, and Ninth Circuits, and the implications of the Sixth Circuit's sexual assault cases discussed *infra*. An assault statute that requires the mere causation of bodily injury does not necessarily require the "use of physical force" for § 922(g)(9) purposes, at least where the statute may be violated through coercion or deception rather than through violent contact with the victim.

b. Defendant's Prior Conviction

On May 7, 2001 Defendant was indicted in Carroll County Circuit Court with intentionally or knowingly causing bodily injury to the mother of his child in violation of Tennessee Code Annotated § 39-13-111(b). (United States' Resp. to Def.'s Mot. to Dismiss the Indictment Ex. A, 2001 Indictment.) Defendant pled guilty to violating § 39-13-111(b) on July 16, 2001. (United States' Resp. to Def.'s Second Mot. to Dismiss the Indictment Ex. A, Judgment; Ex. B, Guilty Plea.) Section 39-13-111(b) punishes assault, as defined in Tennessee Code Annotated § 39-13-101, where the victim is one with whom the offender shares a domestic relationship. *See*

§ 39-13-111(b). Section 39-13-101(a)(1) forbids "[i]ntentionally, knowingly or recklessly caus[ing] bodily injury to another."[5] The indictment, guilty plea, and judgment indicate that Defendant was convicted of an intentional or knowing violation of that section.

The text of § 39-13-101(a)(1) indicates that one may violate the statute without the "use of physical force." For instance, one could cause a victim to suffer bodily injury by deceiving him into drinking a poisoned beverage, without making contact of any kind, let alone violent contact, with the victim.[6] *See Villegas-Hernandez*, 468 F.3d at 879. Alternatively, one could coerce the victim into taking the drink. *See Wynn*, 579 F.3d at 573. Defendant's 2001 conviction for intentionally or knowingly violating § 39-13-101(a)(1) cannot serve as a qualifying misdemeanor crime of domestic violence under § 922(g)(9).

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[5] The Sixth Circuit explained in a footnote in *United States v. Arnold*, 58 F.3d 1117 (6th Cir. 1995) that § 39-13-101 "includes elements that do not necessarily require the use of force." 58 F.3d at 1122 n.4. The Court is unable to determine whether the footnote refers to intentional or knowing violations of § 39-13-101(a)(1).

[6] Citing *James v. United States*, 550 U.S. 192 (2007), the United States argues that the Court should consider how one might typically violate § 39-13-101(a)(1), rather than the statutory definition of the offense. This argument ignores the requirement that the offense have *as an element* the "use of physical force." *See* § 921(a)(33)(A)(ii). Further, *James* is inapposite because that decision concerned the proper application of the categorical approach with regard to the "residual provision" or "otherwise clause" of 18 U.S.C. § 924(e)(2)(B)(ii). This provision does not apply to offenses under 18 U.S.C. § 922(g)(9). *See* 18 U.S.C. § 924(e)(2)(B)(ii).

V. Conclusion

For the foregoing reasons, Defendant's Motion to Dismiss Indictment Pursuant to Rule 12(b) is GRANTED.[7] Counts 4 and 5 of the indictment are DISMISSED. Defendant's Second Motion to Dismiss is DENIED as moot.

IT IS SO ORDERED this 30th day of Apr., 2010.

/s/ JON P. McCALLA
JON P. MCCALLA
CHIEF U.S. DISTRICT JUDGE

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[7] The Court declines to consider Defendant's remaining arguments as to his 922(g)(9) charges.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

NO. 2:08-cr-20420-JPM-cgc

UNITED STATES OF AMERICA, PLAINTIFF

v.

LEISHIA DAWN CASTLEMAN & JAMES ALVIN
CASTLEMAN, DEFENDANTS

Filed: July 6, 2010

ORDER DENYING UNITED STATES' MOTION TO SET ASIDE ORDER

This matter is before the Court on the United States' Motion for Reconsideration, Clarification, and/or Additional Findings (Docket Entry ("D.E.") 109), filed May 4, 2010. Defendant James Alvin Castleman responded in opposition on May 11, 2010. (D.E. 110.) For the following reasons, the Court DENIES the United States' motion to set aside its April 30, 2010 Order Dismissing Counts 4 and 5 of the Superseding Indictment Against James Alvin Castleman (D.E. 108).

I. Background

On August 18, 2009 Defendant James Alvin Castleman was charged in a superseding indictment with, *inter alia*, two counts of violating 18 U.S.C. § 922(g)(9). The Court dismissed those counts on April 30, 2010 because Defendant's prior conviction under Tennessee Code Annotated § 39-13-111(b) and § 39-13-101(a)(1) is not a qualifying misdemeanor crime of domestic violence under 18 U.S.C. § 922(g)(9). The United States now urges the Court to reverse that order on the basis of an additional argument. This argument was not articulated in the United States' initial briefing on Defendant's motion to dismiss counts 4 and 5 of the indictment, but it was presented orally to the magistrate judge who heard that motion on an order of reference.

II. Analysis

The United States' additional argument turns on one of Tennessee's criminal procedure statutes. Title 40 of the Tennessee Code Annotated, entitled "Criminal Procedure," contains the following provision in the chapter entitled "Rights of Defendants":

> Before the court accepts the guilty plea of a defendant charged with a domestic violence offense, it shall inform the defendant that it is a federal offense for a person convicted of a domestic violence offense to possess or purchase a firearm . . . . After so informing the defendant, the court may accept the plea of guilty if the defendant clearly states on the record that the defendant is aware of the consequences of a conviction for a domestic violence offense and still wishes to enter a plea of guilty.

Tenn. Code Ann. § 40-14-109(b). This section defines a "domestic violence offense" as an offense that is classified as a misdemeanor under Tennessee law, committed by one with whom the victim shares a domestic status, and "[h]as as an element the use or attempted use of physical force." Tenn. Code Ann. § 40-14-109(a). Under § 40-14-109, a Tennessee court must, when accepting a guilty plea to a misdemeanor offense committed against a domestic victim that has as an element the use or attempted use of physical force, give the defendant notice of the consequences of such a conviction under federal law. *See* 18 U.S.C. § 922(g)(9) (prohibiting individuals convicted of such crimes from possessing firearms).

The United States argues that the existence of § 40-14-109 shows that Tennessee Code Annotated § 39-13-101(a)(1)[1] has as an element the use or attempted use of physical force (the "force element"). The Court is able to discern from the United States' submissions two ways in which § 40-14-109 could have this effect. First, the United States argues that § 40-14-109 amended § 39-13-101(a)(1) to include the force element. Second, the United States makes the alternative argument that § 40-14-109 reflects the Tennessee General Assembly's sense that § 39-13-101(a)(1) has the force element as a matter of federal law.[2] The Court will consider each proposed reading of § 40-14-109 in turn.

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[1] Under § 39-13-101(a)(1), "[a] person commits assault who . . . intentionally, knowingly or recklessly causes bodily injury to another."

The argument that § 40-14-109 amended § 39-13-101(a)(1) is unpersuasive. This reading of § 40-14-109 would mean that the General Assembly modified a substantive criminal offense by including the modification not in the text of the offense, or even in the title containing the offense, but in the state's criminal procedure title and within the chapter entitled "Rights of Defendants." This is at least an oblique way of establishing a criminal offense, and the Court declines to interpret § 40-14-109 as having such an effect.

The United States' second proposed reading of § 40-14-109 is that it reflects the General Assembly's sense that § 39-13-101(a)(1) has the force element as a matter of federal law. This too is a doubtful interpretation of § 40-14-109. Even assuming that it is accurate, the Court finds § 40-14-109's purported interpretation of § 39-13-101(a)(1) unconvincing for two reasons. First, § 40-14-109 does not contain any discussion of why § 39-13-101(a)(1) has the force element. As reflected in the Court's April 30, 2010 order and the categorical approach case law generally, the question of whether a criminal offense has the force element often is a complicated and subtle one. A conclusion with no articulated reasoning to support it is not persuasive under these circumstances. Second, the Court disagrees with this purported conclusion for the reasons articulated in the

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[2] Under the categorical approach, whether a state offense has an element required by § 922(g)(9) is a matter of federal law. *See United States v. Anglin*, 601 F.3d 523, 527 (6th Cir. 2010).

April 30, 2010 order. The United States' second proposed reading of § 40-14-109 is rejected.

The Court also rejects the United States' argument that § 40-14-109 lacks any meaning if it does not mean that § 39-13-101(a)(1) contains the force element. That § 40-14-109 does not have a meaning that the United States urges does not prove that the statute has no other meaning.

The Court's analysis is not changed by the fact that Defendant argued to the state collateral review court that § 40-14-109 applies to § 39-13-101(a)(1). As noted in the April 10, 2010 order, the Court declines to apply the doctrine of judicial estoppel with regard to that argument. Further, the state court's discussion of § 40-14-109's interaction with § 39-13-101(a)(1) and § 922(g)(9) is ambiguous, and the Court declines to follow its reasoning.

Nor does *United States v. Jenkins*, No. 1:05-CR-135, 2007 WL 542899 (E.D. Tenn. Feb. 16 2007) alter the Court's analysis. That court noted in passing that the defendant received the notice required by § 40-14-109, but a close read of the opinion shows that the question of § 40-14-109's effect was not at issue. *See* 2007 WL 542899, at *1. *Jenkins* is unhelpful on the question of § 40-14-109's meaning.

The Court finds that the existence of § 40-14-109 does not establish that § 39-13-101(a)(1) has the force element as matter of federal law. The outcome of the Court's April 10, 2010 order is unchanged. Section 39-13-101(a)(1) is not a qualifying offense under 18 U.S.C. § 922(g)(9).

III. Conclusion

For the foregoing reasons, the Court DENIES the United States' motion to set aside its Order Dismissing Counts 4 and 5 of the Superseding Indictment Against James Alvin Castleman.

IT IS SO ORDERED this 6th day of July, 2010.

/s/ JON P. MCCALLA
JON P. MCCALLA
CHIEF U.S. DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

No. 08-20420-ML

UNITED STATES OF AMERICA, PLAINTIFF

v.

JAMES ALVIN CASTLEMAN, DEFENDANT

Filed: Feb. 22, 2010

ORDER ADOPTING REPORT AND RECOMMENDATION

Before the Court is Defendants' Motion to Dismiss Indictment Pursuant to Rule 12(b) (DE# 52) and Motion to Dismiss Indictment for Want of Venue, and/or in the Alternative, Motion to Transfer Case form the Western Division to the Eastern Division of the WDTN (DE #53) filed on September 8, 2009.

The Court referred both motions to Magistrate Judge Charmaine G. Claxton for a Report and Recommendation on September 8, 2009. Magistrate Judge Claxton held a hearing on both motions on December 10, 2009. On

February 4, 2010, Magistrate Judge Claxton entered a Report and Recommendation recommending denying both motions. Objections to the Magistrate Judge's order were due by February 18, 2010.

The time period for objections to the Report and Recommendation having expired, and no objections having been filed, it is therefore ORDERED, ADJUDGED, AND DECREED that the Report and Recommendation of the Magistrate Judge is ADOPTED and the Court hereby DENIES both the Defendants' Motion to Dismiss Indictment Pursuant to Rule 12(b) (DE# 52) and Motion to Dismiss Indictment for Want of Venue, and/or in the Alternative, Motion to Transfer Case form the Western Division to the Eastern Division of the WDTN (DE #53).

/s/ JON PHIPPS MCCALLA
JON PHIPPS MCCALLA
UNITED STATES DISTRICT JUDGE
Date: Feb. 22, 2010

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

No. 2:08-cr-20420-JPM-cgc

UNITED STATES OF AMERICA, PLAINTIFF

v.

JAMES ALVIN CASTLEMAN, DEFENDANT

Filed: Feb. 4, 2010

REPORT AND RECOMMENDATION ON DEFENDANT'S FED. R. CRIM. P. 12(b) MOTION TO DISMISS INDICTMENT, AND MOTION TO DISMISS FOR WANT OF VENUE OR TO TRANSFER

Before the Court on Order of Reference for Report and Recommendation (D.E. #54) are Defendant James Alvin Castleman's ("Defendant") Motion to Dismiss Indictment Pursuant to Rule 12(b) (D.E. #52) and Defendant's Motion to Dismiss the Indictment for Want of Venue or, In the Alternative, Motion to Transfer Case from the Western Division to the Eastern Division of the Western District of Tennessee (D.E. #53). On December 18, 2009, Defendant filed a motion to hold his previously filed Motion to Dismiss Indictment Pursuant to Rule 12(b) in abeyance and to continue this case until the conclusion of proceedings involving Defendant in state court.[1] (D.E. #82.) Upon consideration of Defendant's motions, the responses of the Government in opposition, the supporting memoranda and exhibits, and the arguments of counsel at a hearing in the matter held on December 10, 2009, the Court **DENIES** Defendant's request to hold his previously filed motion to dismiss under Rule 12(b) in abeyance and recommends that both of Defendant's motions to dismiss be **DENIED**.

I. Relevant Facts

On July 16, 2001, Defendant entered a guilty plea in the Circuit Court for Carroll County (Tennessee) to one count of misdemeanor domestic assault in violation of Tenn. Code Ann. § 39-13-111(b) (2001). (Ex. 2 to Gov't Resp. to Def.'s Mot. to Dismiss the Indictment: Judgment in Carroll County Circuit Court Case No. 01CR1672.) Under Tenn. Code Ann. § 39-13-111(b), a defendant is guilty of the crime of domestic assault when he commits an assault as defined by Tennessee's general assault statute, Tenn. Code Ann. § 39-13-101, and the victim falls within one of the statutorily defined categories of persons deemed by the law to have a domestic relationship with the defendant.[2] An assault in violation of Tenn. Code Ann. § 39-13-101 occurs when a person

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[1] The full title of this third motion is "Motion to Hold Defendant's Previously Filed Motion to Dismiss Indictment Pursuant to Rule 12(b) in Abeyance and that the Case be Continued Generally until Such Time as the Case of the State of Tennessee v. Castleman, Carroll County Circuit Court #01CR1672 / Court of Criminal Appeals #W2009-01661-CCA-R3-CD, is Brought to a Conclusion."

> (1) [i]ntentionally, knowingly or recklessly causes bodily injury to another;
>
> (2) [i]ntentionally or knowingly causes another to reasonably fear imminent bodily injury; or
>
> (3) [i]ntentionally or knowingly causes physical contact with another and a reasonable person would

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[2] The six categories of "domestic abuse victims" established by Tenn. Code Ann. § 39-13-111(a) currently are as follows:

> (1) Adults or minors who are current or former spouses; (2) Adults or minors who live together or who have lived together; (3) Adults or minors who are dating or who have dated or who have or had a sexual relationship, but does not include fraternization between two (2) individuals in a business or social context; (4) Adults or minors related by blood or adoption; (5) Adults or minors who are related or were formerly related by marriage; or (6) Adult or minor children of a person in a relationship that is described in subdivisions (a)(1)-(5).

Tenn. Code Ann. § 39-13-111(a)(1)-(6) (2009). At the time of Defendant's offense and conviction in 2001, however, the categories of protected persons were a "spouse, former spouse, person related by blood or marriage, or person who currently resides or in the past has resided with that person as if a family, or a person who has a child or children in common with that person regardless of whether they have been married or resided together at any time." Tenn. Code Ann. 39-13-111(a) (2001). The state court indictment of Defendant in 2001 charged that Defendant had a child by the victim. (Ex. 1 to Gov't Resp. to Def.'s Mot. to Dismiss: Indictment in Carroll County Circuit Court Case No. 01CR1672.)

regard the contact as extremely offensive or provocative.

Tenn. Code Ann. 39-13-101(a)(1)-(3) (2001).[3]

The Circuit Court imposed a sentence of 11 months and 29 days to be served on supervised probation pursuant to a negotiated plea agreement. (Ex. 1 to Def.'s Mot. to Dismiss Indictment Pursuant to Rule 12(b): July 16, 2009 Order of Carroll County Circuit Court ("Circuit Court Order") 1.) Defendant thereafter successfully completed probation. (*Id.*)

On December 17, 2008, a federal grand jury in the Western District of Tennessee returned a five-count indictment against Defendant and his wife, Leishia Dawn Castleman. Counts One, Two, and Three charged Mrs. Castleman with making false or fictitious statements to a federally licensed firearms dealer in order to purchase firearms on three separate occasions —March 18, 2005, March 30, 2005, and April 7, 2005— in violation of 18 U.S.C. § 922(a)(6). Counts Four and Five charged Defendant with violating 18 U.S.C. § 922(g)(9) by possessing firearms roughly between March 18, 2005 and February 7, 2006 and again on April 19, 2006 after having previously been convicted of a misdemeanor crime of domestic violence. On August 18, 2009, the grand jury returned a superseding indictment against Defendant and Mrs. Castleman. Counts Four and Five of the superseding indictment charge the same offenses as Counts Four and Five of the original indictment, though the date of the alleged offense charged in Count Four is slightly modified. Counts One through Three of the superseding indictment are otherwise the same as Counts One through Three of the original indictment except that the superseding indictment charges Defendant—in addition to his wife—with violating 18 U.S.C. § 922(a)(6) and adds an aiding and abetting theory under 18 U.S.C. § 2.

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[3] Assault under Tenn. Code Ann. § 39-13-101(a) currently possesses the same definition that it did in 2001. *See* Tenn. Code Ann. § 39-14-101(a) (2009).

Pursuant to 18 U.S.C. § 922(g)(9), it is a violation of federal law for any person who "has been convicted in any court of a misdemeanor crime of domestic violence" to possess a firearm. 18 U.S.C. § 922(g)(9) (2005 & 2006).[4] As used in § 922(g)(9),

> the term "misdemeanor crime of domestic violence" means an offense that—
>
> (i) is a misdemeanor under Federal, State, or Tribal law; and
>
> (ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent,

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[4] The Court will cite to the 2005 and 2006 versions of the U.S. Code throughout this order, as Defendant's alleged violations of federal law occurred in those years. The relevant portions of the U.S. Code read in 2006 as they had in 2005.

> or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.

18 U.S.C. § 921(33)(A) (2005 & 2006).[5] If, however, the conviction has been set aside, federal law does not deem the person to have been convicted of a misdemeanor crime of domestic violence. 18 U.S.C. § 921(33)(B)(ii) (2005 & 2006).

On March 13, 2009, Defendant filed a motion with the Circuit Court for Carroll County to set aside his prior conviction on the grounds that he was not advised before his plea that his conviction would deprive him of the ability to lawfully possess a firearm. (Circuit Court Order 1-2.) Defendant amended his original filing on May 7, 2009 and asserted four specific bases for relief. (*Id.* at 2.) First, Defendant moved for relief under Rule 32(f) of the Tennessee Rules of Criminal Procedure, but the Circuit Court rejected this basis because Defendant filed his motion more than thirty days after judgment became final. (*Id.* at 4.) Second, Defendant moved for relief under Tennessee's Post Conviction Relief Act, Tenn. Code Ann. § 40-30-101 *et seq.*, but the Circuit Court rejected this argument because Defendant's claim was barred by the Act's one-year statute of limitations, *see* Tenn. Code Ann. § 40-30-102. (*Id.* at 4-5.) Next, Defendant contended that he was entitled to habeas corpus relief pursuant to Tenn. Code Ann. § 29-21-107. (*Id.* at 5.) The Circuit Court rejected Defendant's petition for habeas relief because it found that the judgment in his case was not facially invalid and thus void—a prerequisite for habeas relief under Tennessee law—and because Defendant did not satisfy certain other technical requirements imposed by state statute for habeas relief. (*Id.* at 5-6.) Finally, Defendant argued for relief pursuant to Tenn. Code Ann. § 40-26-105 by petitioning for a writ of error coram nobis.[6] (*Id.* at 6.) The Circuit Court found that Defendant was entitled to have his conviction set aside through a writ of error coram nobis. (*Id.* at 8.)

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[5] The term "misdemeanor crime of domestic violence" has remained unchanged since the date of Defendant's alleged offenses. *See* 18 U.S.C. § 921(a)(33)(A) (2009).

In granting Defendant's petition, the Circuit Court reasoned that a writ of error coram nobis could only be used to set aside a guilty plea if the petitioner shows that his plea was not voluntarily and knowingly entered. (*Id.* at 6.) The Circuit Court found that although Defendant's plea was voluntary, it was not knowing or intelligent because Defendant was not advised prior to his plea that a conviction for the offense to which he was pleading guilty would have collateral consequences on his right to possess a firearm. (*Id.* at 7.) Tennessee law specifically provides that "[b]efore the court accepts the guilty plea of a defendant charged with a domestic violence offense, it shall inform the defendant that it is a federal offense for a person convicted of a domestic violence offense to possess or purchase a firearm and that from the moment of conviction for a domestic violence offense the defendant will never again be able to lawfully possess or buy a firearm of any kind." Tenn. Code Ann. § 40-14-109(b) (2001).[7] After an evidentiary hearing, the Circuit Court found that the presiding judge who accepted Defendant's guilty plea never advised him of the consequences his plea would have on his right to possess a firearm. (*Id.* at 3.) Accordingly, the court concluded that the requirements of Tenn. Code Ann. § 40-14-109(b) had not been satisfied, and Defendant's plea and conviction were set aside. (*Id.* at 8.) The Circuit Court's order was signed and filed July 16, 2009. The State of Tennessee has appealed the Circuit Court's ruling to the Tennessee Court of Criminal Appeals, which has yet to issue its decision regarding the State's appeal.

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[6] Tennessee Code Annotated § 40-26-105(b) provides for the writ of error coram nobis as follows: "Upon a showing by the defendant that the defendant was without fault in failing to present certain evidence at the proper time, a writ of error coram nobis will lie for subsequently or newly discovered evidence relating to matters which were litigated at the trial if the judge determines that such evidence may have resulted in a different judgment, had it been presented at the trial." Tenn. Code Ann. § 40-26-105(b) (2009).

II. Legal Standard

A. Legal Standard for Motion to Dismiss under Fed. R. Crim. P. 12(b)(3)(B)

Rule 12(b)(3)(B) of the Federal Rules of Criminal Procedure provides that a defendant must challenge "a defect in the indictment or information" prior to trial but that "at any time while the case is pending, the court may hear a claim that the indictment or information fails to invoke the court's jurisdiction or to state an offense." Fed. R. Crim. P. 12(b)(3)(B). This rule enables the court to address dispositive questions of law, rather than of fact, prior to trial. *United States v. Ali*, 557 F.3d 715, 719 (6th Cir. 2009); *see United States v. Titterington*, 374 F.3d 453, 457 (6th Cir. 2004) ("[A] pretrial motion alleging a 'defect in the indictment' under the Federal Rules, *see* Fed. R. Crim. P. 12(b)(3)(B), represents the modern equivalent of a 'demurrer' because both pleadings serve to attack the facial validity of the indictment."). In ruling upon a motion to dismiss under Rule 12, however, the court "may make preliminary findings of fact necessary to decide questions of law presented by pretrial motions so long as the trial court's conclusions do not invade the province of the ultimate finder of fact." *Ali*, 557 F.3d at 719 (quoting *United States v. Levin*, 973 F.2d 463, 467 (6th Cir. 1992)).

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[7] Section 40-14-109(b) reads the same now as it did in 2001. *See* Tenn. Code Ann. § 40-14-109(b) (2009).

B. Legal Standard for Motion to Transfer Venue

Generally, "the government must prosecute an offense in a district where the offense was committed . . . [and] . . . [t]he court must set the place of trial within the district with due regard for the convenience of the defendant, any victim, and the witnesses, and the prompt administration of justice." Fed. R. Crim. P. 18; *see* U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law . . . . "); *cf.* Fed. R. Crim. P. 21

(providing for transfer of venue to another judicial district). No rule, however, entitles a defendant to a trial in any particular division within the forum district. *United States v. Davis*, 27 F. App'x 592, 597 (6th Cir. 2001); *United States v. Erwin*, 155 F.3d 818, 824 (6th Cir. 1999); *see United States v. Traficant*, 209 F. Supp. 2d 764, 778 (N.D. Ohio 2002) ("A defendant in a criminal case has no right to jurors drawn from the entire district, no right to jurors drawn from a particular division, and no right to a trial held in a particular division."). The location of a criminal trial within a district, as well as the decision whether to transfer a case to a different division, is a matter committed to the sound discretion of the trial court. *See, e.g., United States v. Lewis*, 504 F.2d 92, 98 (6th Cir. 1974).

III. Analysis

A. The setting aside of the state court conviction after the date of the actions alleged in the indictment does not invalidate the indictment.

Defendant stands accused of violating 18 U.S.C. § 922(g)(9), which makes it unlawful for any person "who has been convicted in any court of a misdemeanor crime of domestic violence[] to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce." 18 U.S.C. § 922(g)(9) (2005 & 2006). Defendant argues that the setting aside of his prior misdemeanor conviction by the Carroll County Circuit

Court precludes a conviction under § 922(g)(9). The Court disagrees.

The fact that Defendant's state court conviction for domestic violence was set aside in 2009 does not affect the instant charges against Defendant for allegedly violating § 922(g)(9) in 2005 and 2006. A person whose underlying conviction had been set aside *at the time of his possession* may not be convicted under § 922(g), *see* 18 U.S.C. § 921(a)(33)(B)(ii), but a setting aside of the predicate offense after the date of the defendant's illegal possession of a firearm is irrelevant to a § 922(g) prosecution initiated before the conviction was set aside. *See United States v. Muir*, No. 1:03-CR-162-DAK, 2006 WL 288419, *2 (D. Utah Feb. 6, 2006) (citing *Lewis v. United States*, 445 U.S. 55, 62-64 (1980) and *United States v. Mayfield*, 810 F.2d 943, 944 (10th Cir. 1987)); *see also United States v. Epps*, 240 F. App'x 247, 248 (9th Cir. 2007) (citing *United States v. Padilla*, 387 F.3d 1087, 1092 (9th Cir. 2004)). Thus, "[i]t is the status of the defendant on the date he possessed the firearm as alleged in the indictment that controls whether or not he has violated the statute, not his later status after his civil rights have been restored." *United States v. Morgan*, 216 F.3d 557, 565-66 (6th Cir. 2000).[8]

Moreover, the fact that the conviction for the predicate offense was unlawfully obtained will not prevent a defendant from being found guilty of possessing a firearm in violation of federal law. In *Lewis v. United States*, the Supreme Court considered now-repealed 18 U.S.C. App. § 1202(a)(1), which contained language similar to the language in § 922(g) prohibiting the possession of a firearm by a felon. 445 U.S. 55 (1980). The Court held that a defendant previously convicted of a felony may be convicted for subsequently possessing a firearm, even if the original conviction was obtained in violation of the defendant's constitutional rights. *Id.* at 65 ("We therefore hold that § 1202(a)(1) prohibits a felon from possessing a firearm despite the fact that the predicate felony may be subject to collateral attack on constitutional grounds."). Courts have continued to adhere to this rule in interpreting § 922(g), and thus a defendant must have removed any legal impediments to his possession of a firearm prior to possession. *United States v. Coleman*, 458 F.3d 453, 456 (6th Cir. 2006) ("The Supreme Court has long since held that weapons disability statutes such as § 922(g) require felons to clear their legal status prior to obtaining a firearm."). Therefore, the subsequent setting aside of Defendant's conviction in state court for violating Tenn. Code Ann. § 39-13-111(b) does not affect the pending federal indictment, notwithstanding the state court's finding that the conviction should be vacated.

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[8] Likewise, Castleman's conviction is not subject to the exception contained in § 921(a)(33)(B)(i)(II)(bb) as the adjucation that the plea was not knowing was not made until after the date of the incidents alleged in the indictment.

Similarly, there is no valid basis for holding Defendant's motion in abeyance pending resolution of the State of Tennessee's appeal to the Court of Criminal Appeals. The Government may prosecute Defendant for violating § 922(g)(9) irrespective of whether the

State of Tennessee prevails on its appeal because it is Defendant's status at the time of the alleged offense that determines whether Defendant could lawfully possess a firearm.[9]

B. The defendant is judicially estopped from asserting that the misdemeanor to which he plead guilty is not a "crime of domestic violence" as defined in 18 U.S.C. § 922(g)(9).

Defendant also argues that even if his prior domestic assault conviction is to be considered, it does not constitute a misdemeanor crime of domestic violence for purposes of 18 U.S.C. § 922(g)(9). Defendant seeks to have the Court declare that Tenn. Code Ann. § 39-13-111 does not necessarily contain "physical force" as an element of the offense and thus his guilty plea to domestic violence would not qualify as a predicate offense for a 18 U.S.C. § 922(g)(9) prosecution. In this case, however, Defendant himself has already resolved this argument in favor of the Government.

In his efforts to set aside his domestic violence conviction, Defendant argued successfully that his guilty plea was not knowing and intelligent. The state court considering Defendant's petition for a writ of error coram nobis found that Defendant had not been warned prior to tendering his guilty plea that he would lose his right to possess a firearm once his plea was accepted and he was adjudged guilty of violating Tenn. Code Ann. § 39-13-111(b). By so doing, the state court relied on the dictates of Tenn. Code Ann. § 40-14-109(b), which requires that a defendant be warned that he will lose his right to possess a firearm upon conviction for a "domestic violence offense" as defined by Tenn. Code Ann. § 40-14-109(a). The definition of "domestic violence offense" in Tenn. Code Ann. § 40-14-109(a) tracks the definition of "misdemeanor crime of domestic violence" contained in 18 U.S.C. § 921(a)(33). Specifically, Tenn. Code Ann. § 40-14-109(a)(2) requires a "domestic violence offense" to have "as an element of the offense the use or attempted use of physical force or the threatened use of a deadly weapon." This language is identical to that contained in the federal statute defining a "misdemeanor crime of domestic violence" for purposes of § 922(g)(9). 18 U.S.C. § 921(a)(33)(A)(ii) (2005 & 2006) ("[T]he term 'misdemeanor crime of domestic violence' means an offense that . . . has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon . . . .").

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[9] Defendant's motion of December 12, 2009 requesting that consideration of his motion to dismiss be held in abeyance also requests that his case be continued generally until the Tennessee Court of Criminal Appeals issues its decision and the case in state court is finally resolved. Although the question of whether Defendant's case should be continued has not been formally referred and it is not a matter a magistrate judge may determine, it is recommended that the District Court **DENY** Defendant's request that this case be continued until conclusion of all proceedings in state court.

"[W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him." *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (quotations and citation omitted). "This rule, known as judicial estoppel, 'generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase.'" *Id.* (quoting *Pegram v. Herdrich*, 530 U.S. 211, 227 n.8 (2000)). Thus, judicial estoppel forbids a party from taking a position inconsistent with one "successfully and unequivocally asserted by that same party in an earlier proceeding." *Warda v. C.I.R.*, 15 F.3d 533, 538 (6th Cir. 1994) (citations omitted). Judicial estoppel "preserves the integrity of the courts by preventing a party from abusing the judicial process through cynical gamesmanship, achieving success on one position, then arguing the opposite to suit an exigency of the moment." *Teledyne Indus. v. Nat'l Labor Relations Bd.*, 911 F.2d 1214, 1218 (6th Cir. 1990); *see Reynolds v. C.I.R.*, 861 F.2d 469, 472 (6th Cir. 1988); *Edwards v. Aetna Life Ins. Co.*, 690 F.2d 595, 598 (6th Cir. 1982). The Sixth Circuit has stated that there is no fixed formula for application of judicial estoppel,[10] but that there exist several considerations:

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[10] Often, though not invariably, the Sixth Circuit has stated in dicta that the contradictory assertion must have been made under oath. *See, e.g., Browning v. Levy*, 283 F.3d 761, 775 (6th Cir. 2002) ("The doctrine of judicial estoppel bars a party from (1) asserting a position that is contrary to one that the party has asserted under oath in a prior proceeding, where (2) the prior court adopted the contrary position either as a preliminary matter or as part of a final disposition.") (citation and internal quotation marks omitted). The

> First, a party's later position must be clearly inconsistent with its earlier position. Second, a court should review whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled. Finally, the court should evaluate whether the party advancing an inconsistent position would gain an unfair advantage if allowed to proceed with the argument.

In re Commonwealth Institutional Secs., Inc., 394 F.3d 401, 406 (6th Cir. 2005) (quoting *New Hampshire*, 532 U.S. at 750) (internal citations and quotation marks omitted). "[I]t is well-established that at a minimum, 'a party's later position must be 'clearly inconsistent' with its earlier position[ ]' for judicial estoppel to apply[.]" *Lorillard Tobacco Co. v. Chester, Willcox & Saxbe*, 546 F.3d 752, 757 (6th Cir. 2008) (quoting *New Hampshire*, 532 U.S. at 750).

Sixth Circuit, however, has also applied the doctrine of judicial estoppel without ever finding that the prior position was asserted under oath. *Reynolds v. C.I.R.*, 861 F.2d 469, 473-74 (6th Cir. 1988). Furthermore, the Supreme Court's opinion in *New Hampshire v. Maine*, 532 U.S. 742 (2001), which applied judicial estoppel against the State of New Hampshire in a dispute with the State of Maine, articulates no such requirement for the application of judicial estoppel, and in interpreting that decision, the Sixth Circuit has stated that "[t]here is no set formula for assessing when judicial estoppel should apply," *In re Commonwealth Institutional Secs., Inc.*, 394 F.3d 401, 406 (6th Cir. 2005) (citing *New Hampshire*, 532 U.S. at 750).

In the instant case, Defendant's guilty plea was set aside because he did not receive the warning mandated by Tenn. Code Ann. § 40-14-109(b)—a warning that is only required when a defendant pleads guilty to a "domestic violence offense" which has "as an element of the offense the use or attempted use of physical force or the threatened use of a deadly weapon." That is, only if the offense contains the use or attempted use of physical force (or the threatened use of a deadly weapon) would Defendant have been required to receive the warning mandated by Tenn. Code Ann. § 40-14-109(b). Although the state court order granting Defendant coram nobis relief asserts that the court assumed without deciding that Defendant's conviction qualified as an offense which would affect Defendant's right to possess a firearm (*see* Circuit Court Order 2), the relief the court granted necessarily required a finding that Defendant's offense possessed use or attempted use physical force (or the threatened use of a deadly weapon) as an element. Otherwise, Defendant could not have obtained the coram nobis relief he received.

Thus, Defendant's current argument is directly contrary to the theory upon which he sought and obtained coram nobis relief in state court. To permit Defendant to advance one argument in state court and then argue its opposite upon entering a federal forum would allow the type of intolerable gamesmanship that judicial estoppel is meant to prevent. Because the state court accepted Defendant's argument that he should have received the warning required by Tenn. Code Ann. § 40-14-109(b) due to the effects the conviction would have on his right to possess a firearm, Defendant cannot now argue to the contrary that he was convicted of an offense which did not affect his firearm rights.[11] Therefore, as Defendant prevailed in state court by arguing that his prior conviction was a misdemeanor crime of domestic violence for which he needed to be warned that he would lose his right to possess a firearm, Defendant is estopped from claiming that the misdemeanor to which he pled guilty was not a crime of domestic violence which includes "as an element of the offense the use or attempted use of physical force or the threatened use of a deadly weapon."

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[11] Defendant's brief filed in the Court of Criminal Appeals—which Defendant attached as an exhibit to a motion recently filed in this Court to continue a report date—likewise asserts that Defendant should have been advised under Tenn. Code Ann. § 40-14-109(b) that a conviction for the offense to which he pled guilty would affect his right to possess a firearm. (*See* Ex. 1 to Def.'s Mot. to Continue Report Date: Brief of the Appellee, James Alvin Castleman, in the Court of Criminal Appeals.) Defendant further contends that if he had been properly informed, he would not have pled guilty. Again, Defendant can only avail himself of § 40-14-109(b) if the offense to which he pled guilty contained "as an element of the offense the use or attempted use of physical force or the threatened use of a deadly weapon." *See* Tenn. Code Ann. § 40-14-109(b) (2001). And, if the offense contained the use or attempted use of physical force as an element, then according to 18 U.S.C. § 921(a)(33)(A)(ii) it qualifies as a predicate offense for a prosecution under 18 U.S.C. § 922(g)(9).

C. The circumstances do not warrant transfer of this matter from the Western Division to the Eastern Division of the Western District of Tennessee.

Defendant also seeks dismissal of the superseding indictment for want of venue. Rule 18 of the Federal Rules of Criminal Procedure only requires that the Government "prosecute an offense in a *district* where the offense was committed[.]" Fed. R. Crim. P. 18 (emphasis added). The superseding indictment, like the original indictment, alleges that Defendant committed certain federal offenses in the Western District of Tennessee, and Defendant does not contest the assertion that the alleged criminal acts occurred in the Western District of Tennessee. Because the Government is prosecuting this case in the judicial district of the alleged offenses, there exists no defect in the venue of this action.

Alternatively, Defendant seeks to transfer this case from the Western Division of the Western District of Tennessee to the Eastern Division at Jackson on the grounds that it will be inconvenient for him, his attorney, and his witnesses if the matter is tried in Memphis rather than Jackson. Defendant was first indicted on December 17, 2008, and he did not file a motion challenging venue until September 8, 2009, almost nine months later. In this nine-month period, there have been report dates and other proceedings for which Defendant received permission not to attend. The hearing on the instant motions created the first opportunity for Defendant's counsel to appear personally in Memphis. Furthermore, although Defendant resides closer to Jackson than Memphis and Defendant represents that his witnesses are located in the Eastern Division, the Government indicates that its witnesses are located in Memphis.

The decision to transfer a case within the district is discretionary, and a defendant has no right to have his case heard in a particular division. The Court recommends that Defendant's motion to transfer be **DENIED** because Defendant has not articulated a reason sufficiently compelling to warrant a transfer of this matter after a delay of nearly nine months.

IV. Conclusion and Recommendation

For the foregoing reasons, Defendant's request to hold consideration of his motion to dismiss under Rule 12(b) in abeyance pending resolution of proceedings against Defendant in state court is **DENIED**, and it is recommended that Defendant's Motion to Dismiss under Rule 12(b) of the Federal Rules of Criminal Procedure be **DENIED**. It is further recommended that Defendant's Motion to Dismiss for want of venue or, in the alternative, to transfer the matter to the Eastern Division also be **DENIED**.

IT IS SO ORDERED this 4th day of Feb., 2010.

/s/ CHARMIANE G. CLAXTON
CHARMIANE G. CLAXTON
UNITED STATES MAGISTRATE JUDGE

ANY OBJECTIONS OR EXCEPTIONS TO THIS REPORT MUST BE FILED WITHIN FOURTEEN (14) DAYS AFTER BEING SERVED WITH A COPY OF THE REPORT. 28 U.S.C. § 636(b)(1)(C). FAILURE TO FILE SAID OBJECTIONS OR EXCEPTIONS WITHIN FOURTEEN (14) DAYS MAY CONSTITUTE A WAIVER OF OBJECTIONS, EXCEPTIONS, AND ANY FURTHER APPEAL.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 10-5912

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

JAMES ALVIN CASTLEMAN, DEFENDANT-APPELLEE

[Filed: Dec. 19, 2012]

ORDER

Before: MOORE, CLAY, and MCKEAGUE, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied. Judge McKeague would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER OF THE COURT

/s/ DEBORAH S. HUNT
DEBORAH S. HUNT, Clerk

APPENDIX G

1. 18 U.S.C. 921 provides in pertinent part:

Definitions

(a) As used in this chapter—

* * * * *

(33)(A) Except as provided in subparagraph (C)[2], the term "misdemeanor crime of domestic violence" means an offense that—

(i) is a misdemeanor under Federal, State, or Tribal[3] law; and

(ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.

* * * * *

---

[2] So in original. No subparagraph (C) has been enacted.

[3] So in original. Probably should not be capitalized

2. 18 U.S.C. 922 provides in pertinent part:

Unlawful Acts

(g) It shall be unlawful for any person—

* * * * *

(9) who has been convicted in any court of a misdemeanor crime of domestic violence,

to ship or tranport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

* * * * *

3. Tennessee Code Ann. § 39-13-101 (2001) provides:

Assault.—

(a) A person commits assault who:

(1) Intentionally, knowingly or recklessly causes bodily injury to another;

(2) Intentionally or knowingly causes another to reasonably fear imminent bodily injury; or

(3) Intentionally or knowingly causes physical contact with another and a reasonable person would regard the contact as extremely offensive or provocative.

(b) Assault is a Class A misdemeanor unless the offense is committed under subdivision (a)(3), in which event assault is a Class B misdemeanor

4. Tennessee Code Ann. § 39-11-106 (2001) provides in pertinent part:

(a) As used in this title, unless the context requires otherwise:

* * * * *

(2) "Bodily injury" includes a cut, abrasion, bruise, burn or disfigurement; and physical pain or temporary illness or impairment of the function of a bodily member, organ, or mental faculty;

5. Tennessee Code Ann. § 39-13-111 (2001) provides:

(a) As used in this section, "family or household member" means spouse, former spouse, person related by blood or marriage, or person who currently resides or in the past has resided with that person as if a family, or a person who has a child or children in common with that person regardless of whether they have been married or resided together at any time.

(b) A person who commits domestic assault who commits an assault as defined in § 39-13-101 against a person who is that person's family or household member.

(c) Domestic assault is punishable the same as assault in § 39-13-101.

6. Tennessee Code Ann. § 39-13-111 (Supp. 2012) provides:

Domestic assault.

(a) As used in this section, "domestic abuse victim" means any person who falls within the following categories:

(1) Adults or minors who are current or former spouses;

(2) Adults or minors who live together or who have lived together;

(3) Adults or minors who are dating or who have dated or who have or had a sexual relationship, but does not include fraternization between two (2) individuals in a business or social context;

(4) Adults or minors related by blood or adoption;

(5) Adults or minors who are related or were formerly related by marriage; or

(6) Adult or minor children of a person in a relationship that is described in subdivisions (a)(1)-(5).

(b) A person commits domestic assault who commits an assault as defined in § 39-13-101 against a domestic abuse victim.

(c)(1) A first conviction for domestic assault and a second or subsequent conviction for domestic assault committed in a manner prohibited by § 39-13-101(a)(2) and (a)(3) is punishable the same as assault under § 39-13-101, and additionally, as provided in subdivisions (c)(2) and (c)(3) and subsection (d) of this section.

(2) A second conviction for domestic assault committed in a manner prohibited by § 39-13-101(a)(1) is punishable by a fine of not less than three hundred fifty dollars ($350) nor more than three thousand five hundred dollars ($3,500), and by confinement in the county jail or workhouse for not less than thirty (30) days, nor more than eleven (11) months and twenty-nine (29) days.

(3) A third or subsequent conviction for domestic assault committed in a manner prohibited by § 39-13-101(a)(1), is punishable by a fine of not less than one thousand one hundred dollars ($1,100) nor more than five thousand dollars ($5,000), and by confinement in the county jail or workhouse for not less than ninety (90) days, nor more than eleven (11) months and twenty-nine (29) days.

(4) For purposes of this section, a person who is convicted of a violation of § 39-13-111 committed in a manner prohibited by § 39-13-101(a)(1), shall not be subject to the enhanced penalties prescribed in this subsection (c), if ten (10) or more years have elapsed between the date of the present violation and the date of any immediately preceding violation of § 39-13-111, committed in a manner prohibited by

§ 39-13-101(a)(1), that resulted in a conviction for such offense.

(5) In addition to any other punishment that may be imposed for a violation of this section, if, as determined by the court, the defendant possesses the ability to pay a fine in an amount not in excess of two hundred twenty-five dollars ($225), then the court shall impose a fine at the level of the defendant's ability to pay, but not in excess of two hundred twenty-five dollars ($225). The additional fine shall be paid to the clerk of the court imposing sentence, who shall transfer it to the state treasurer, who shall credit the fine to the general fund. All fines so credited to the general fund shall be subject to appropriation by the general assembly for the exclusive purpose of funding family violence shelters and shelter services. This appropriation shall be in addition to any amount appropriated pursuant to § 67-4-411.

(6) A person convicted of a violation of this section shall be required to terminate, upon conviction, possession of all firearms that the person possesses as required by § 36-3-625.

(d) As part of a defendant's alternative sentencing for a violation of this section, the sentencing judge may direct the defendant to complete a drug or alcohol treatment program or available counseling programs that address violence and control issues including, but not limited to, a batterer's intervention program that has been certified by the domestic violence state coordinating council. Completion of a noncertified batterer's intervention program shall only be ordered if no certified program is available in the sentencing county. No batterer's intervention program, certified or noncertified, shall be deemed complete until the full term of the program is complete, and a judge may not require a defendant to attend less than the full term of a program as part of a plea agreement or otherwise. The defendant's knowing failure to complete such an intervention program shall be considered a violation of the defendant's alternative sentence program and the sentencing judge may revoke the defendant's participation in such program and order execution of sentence.

7. Connecticut Gen. Stat. Ann. § 53a-61 (West 2012) provides in pertinent part:

Assault in the third degree: Class A misdemeanor

(a) A person is guilty of assault in the third degree when:

(1) With intent to cause physical injury to another person, he causes such injury to such person or to a third person; or

(2) he recklessly causes serious physical injury to another person; or

(3) with criminal negligence, he causes physical injury to another person by means of a deadly weapon, a dangerous instrument or an electronic defense weapon.

* * * * *

8. Delaware Code Ann. tit 11, § 611 (Michie 2007) provides:

Assault in the third degree; class A misdemeanor.

A person is guilty of assault in the third degree when:

(1) The person intentionally or recklessly causes physical injury to another person; or

(2) With criminal negligence the person causes physical injury to another person by means of a deadly weapon or a dangerous instrument.

Assault in the third degree is a class A misdemeanor.

9. Florida Stat. Ann. § 784.03 (West 2007) provides in pertinent part:

Battery; felony battery

(1)(a) The offense of battery occurs when a person:

1. Actually and intentionally touches or strikes another person against the will of the other; or

2. Intentionally causes bodily harm to another person.

* * * * *

10. 720 Ill. Comp. Stat. Ann. 5/12-3 (West Supp. 2012) provides in pertinent part:

Battery

Battery. (a) A person commits battery if he inentionally or knowingly without legal and justification by any means (1) causes bodily harm to an individual or (2) makes physical contact of an insulting or provoking nature with an individual.

* * * * *

OPPOSITION BRIEF

RECORD
AND
BRIEFS

No. 12-1371

In the Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

JAMES ALVIN CASTLEMAN,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Section 922(g)(9) of Title 18, United States Code, makes it a crime for any person convicted of a "misdemeanor crime of domestic violence" to possess a firearm. Such a crime is defined as one that includes, "as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon." 18 U.S.C. 921(a)(33)(A). In *Johnson* v. *United States*, 559 U.S. 133 (2010), this Court held that virtually identical language used to define the term "violent felony," as used in 18 U.S.C. § 924(e)(2)(B)(1), requires the use of "violent force." The question presented is:

Whether the term "use of physical force" has the same meaning in Sections 924(e)(2)(B)(i) and 921(a)(33)(A).

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RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT

Federal law bars a person who has been convicted of a "misdemeanor crime of domestic violence," defined in relevant part as an offense that "has, as an element, the use or attempted use of physical force," from possessing a firearm. Federal law similarly bars a person who has been convicted of a "violent felony," defined in relevant part as an offense that "has, as an element the use, attempted use, or threatened use of physical force," from possessing a firearm. In *Johnson* v. *United States*, 559 U.S. 133, 136 (2010) (internal quotation marks omitted), this Court held that the definition of "physical force," as used in the "violent felony" definition, means "*violent* force." But in this case, the government argues that the term "physical force" means very different things when used to define "violent felony" and "misdemeanor crime of domestic violence:" in the first case the government, following *Johnson*, understands it to mean "violent force;" in the second, the government takes it to mean any "offensive touching."

The government's contention, and its related argument that the Court should address the issue, is incorrect. It is wrong on the merits: as the court below held, it is fundamental that identical terms used for similar purposes in closely related statutes should be given the same meaning—and that is particularly so in this case, where the government's reading would mean that a person could commit a crime of "domestic violence" without doing anything violent at all. And the government is wrong in contending that there is disagreement between the courts of appeals on the question presented that warrants this Court's attention. The conflict asserted by the government is largely illusory, and review by this Court of the question presented, if ever appropriate, should await further consideration by the lower courts of *Johnson*'s impact. Because the decision below is correct, and because the courts of appeals are moving toward consensus on the question presented without this Court's intervention, the petition for certiorari should be denied.

1. Under 18 U.S.C. § 922(g)(9), it is unlawful for any person "who has been convicted in any court of a misdemeanor crime of domestic violence to * * * possess in or affecting commerce, any firearm or ammunition." A "misdemeanor crime of domestic violence" is defined as a misdemeanor under federal, state, or tribal law committed by a person with a specified domestic relationship with the victim that "has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon." 18 U.S.C. § 921(a)(33)(A)(ii). Violators of Section 922(g)(9) may be fined, imprisoned for not more than ten years, or both. *Id.* § 924(a)(2).

Other statutes make use of very similar language. In particular, 18 U.S.C. § 924(e)(2)(B)(i), which also criminalizes the possession of firearms by persons who have committed a specified offense, defines a "violent felony" as one that, in relevant part, has "as an element the use, attempted use, or threatened use of physical force against the person of another." In *Johnson*, this Court held that the term "physical force" as used in Section 924(e)(2)(B)(i) means "*violent* force"—that is, "force strong enough to constitute 'power.'" 559 U.S. at 140, 142. And in *Leocal* v. *Ashcroft*, 543 U.S. 1, 11 (2004), the Court similarly held that the term "crime of violence," as used in 18 U.S.C. § 16(a), "suggests a category of violent, active crimes."

2. Respondent pleaded guilty, in 2001, to one count of misdemeanor domestic assault in violation of Tennessee Code Ann. § 39-13-111(b). Pet. App. 53a-54a. As it read in 2001, that state law imposed liability when a defendant "commit[ted] an assault as defined in section 39-13-101 against a person who is that person's family or household member." Tenn. Code. Ann. § 39-13-111(b) (West 2001).[1] The corresponding definition of "assault" provided by Tenn. Code Ann. § 39-13-101(a) is "[i]ntentionally, knowingly, or recklessly caus[ing] bodily injury to another;" "bodily injury" is in turn defined as "a cut, abrasion, bruise, burn or disfigurement; physical pain or temporary illness or impairment of the function of a bodily member, organ, or mental faculty." *Id.* § 39-11-106(a)(2). Respondent's indictment, in line with the language of these statutes, alleged that he "did intentionally or knowingly cause bodily injury" in violation of section 39-13-111(b). Indictment, No. 01CR1672 (May 7, 2001). See Pet. 4.

3. Eight years later, in 2009, respondent was charged with possession of firearms by a person previously convicted of a misdemeanor crime of domestic violence in violation of Section 922(g)(9). Pet. App. 54a-55a. Respondent moved to dismiss the charges, arguing that his Tennessee conviction was not a "misdemeanor crime of domestic violence" under Section 922(g)(9) because the Tennessee offense did not

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[1] As in the petition, all references to the Tennessee Code Annotated in this brief are to the 2001 version—the version in force at the time respondent was charged—unless otherwise specified.

include, as an element, "the use of physical force." The district court agreed and ordered the charges dismissed. Pet. App. 34a-50a.

The court began by noting "that an assault statute does not require the 'use of physical force' solely because force in the scientific sense is involved in the offense." Pet. App. 39a. Accordingly, "[a]n assault statute that requires the mere causation of bodily injury does not necessarily require the 'use of physical force' for § 922(g)(9) purposes, at least where the statute may be violated through coercion or deception rather than through violent contact with the victim." *Id.* at 40a. And here, the court found that the text of the Tennessee assault statute "indicates that one may violate the statute without the 'use of physical force.' For instance, one could cause a victim to suffer bodily injury by deceiving him into drinking a poisoned beverage, without making contact of any kind, let alone violent contact, with the victim." Pet. App. 41a. Alternatively, the court continued, "one could coerce the victim into taking the drink." *Ibid.* Accordingly, the court concluded that conviction for violating the Tennessee statute "cannot serve as a qualifying misdemeanor crime of domestic violence under § 922(g)(9)." *Ibid.*

4. The Sixth Circuit affirmed. Pet. App. 1a-33a. The court began by "determin[ing] the degree of force necessary for a misdemeanor domestic battery offense to qualify as a misdemeanor crime of domestic violence." *Id.* at 5a. In undertaking this inquiry, the court noted that Section 921(a)(33)(A), which defines misdemeanor crime of domestic violence, uses language "nearly identical" to that employed in Sections 924(e)(2)(B)(i) and 16(a), which "supports the inference that Congress intended them to capture offens-

es criminalizing identical degrees of force." *Id.* at 6a, 7a. That conclusion "gains strength in light of the order in which Congress adopted the statutes" because Section 921(a)(33)(A) was enacted last. *Id.* at 7a-8a. As a consequence, the court "conclude[d] that the degree of force *Johnson* requires for a conviction under § 924(e)(2)(B)(i) is required of a misdemeanor crime of domestic violence." *Id.* at 10a. Under this test, the court found that "[m]isdemeanor crime of 'domestic violence' is most naturally interpreted to mean any crime requiring strong and violent physical force, which happens to be a misdemeanor." *Id.* at 12a. The court therefore rejected the government's contention that Section 922(g)(9) criminalizes all conduct establishing a common-law assault and battery offense, which may "involve[] no more than slight physical touching." *Id.* at 6a.

The court then turned to the question of whether, under this standard, the Tennessee domestic assault statute "categorically qualifies as a misdemeanor crime of domestic violence"—that is, whether establishing the elements of the state offense *necessarily* would show that the defendant committed the federal crime. Pet. App. 15a. On this, the court noted that, even though it was permitted to consider respondent's indictment in determining the nature of his offense, "[t]he indictment does not specify the type of injury [respondent] caused or its severity." *Id.* at 18a. Like the Tennessee statute under which respondent was convicted, the indictment simply said that he "did intentionally or knowingly cause bodily injury." *Ibid.* And the court of appeals found that "an individual can cause an unspecified bodily injury with nonviolent physical force." *Ibid.* Respondent therefore "may have been convicted for causing a minor, nonserious physical injury, in which he caused * * * bodily harm, but did so using less than strong physical force." *Id.* at 19a. The possibility that respondent used nonviolent force, in the majority's view, placed him outside the reach of Section 922(g)(9).

Judge Moore filed a concurring opinion. Pet. App. 21a-23a. She agreed that "the force requirement for a misdemeanor crime of domestic violence is identical to that specified under the crime-of-violence statute [Section 16] and [Section 924(e)(2)(B)(i)]." *Id.* at 21a. And under this definition, "it is not enough to look only at the *result* of the defendant's conduct; instead, the focus must be on the nature of the force proscribed by the statute and whether the *conduct itself* necessarily involves violent force." *Id.* at 22a. Under this inquiry, the Tennessee assault statute does not create a "misdemeanor crime of domestic violence." *Id.* at 23a.

Judge McKeague dissented. Pet. App. 23a-33a. In his view, the "violent felony" and "misdemeanor crime of domestic violence" standards are not identical. *Id.* at 26a. And he believed that "knowingly or intentionally causing bodily injury necessitates use of physical force." *Id.* at 30a.

5. The Sixth Circuit denied the government's petition for rehearing, with no judge requesting a vote for rehearing en banc. Pet. App. 72a-73a.

REASONS FOR DENYING THE PETITION

In *Johnson*, this Court held that the phrase "use of physical force," when used in connection with the commission of a violent crime, means the use of *violent* force. The court below reached the same conclusion in this case. That holding, which follows from the plain text of the statute, is correct. And because most courts of appeals have not yet had the opportunity to address the significance of the decision in *Johnson* to application of Section 922(g)(9), review of the question presented in this case would be premature. The government's petition for a writ of certiorari should be denied.

A. The Decision Below Is Correct.

The government begins by contending that the decision below is wrong for two reasons. It asserts (1) that a defendant need not use violent force to commit a "crime of domestic violence;" and (2) that any crime that causes bodily injury necessarily involves the use of violent physical force. Pet. 12-19. Both of these contentions are incorrect.

1. The definition of a "misdemeanor crime of domestic violence" does not track that of common-law battery.

The government first insists that this Court's decision in *Johnson* has no bearing on the question in this case and that "[t]he statutory definition of a 'misdemeanor crime of domestic violence' tracks the common-law definition of battery." Pet. 11-12. That is not so.

a. In *Johnson*, the Court addressed the meaning of 18 U.S.C. § 924(e), which in relevant part defines the term "violent felony" as an offense that "has as an element the use, attempted use, or threatened use of physical force against the person of another." *Id.* § 924(e)(2)(B). The Court explained that the definitions of "force" that are in "general usage" suggest "a degree of power that would not be satisfied by the merest touching." *Johnson*, 559 U.S. at 139. See also *id.* at 142 ("the term 'physical force' itself normally connotes force strong enough to constitute 'power'").

Although the Court recognized that the common-law definition of battery was "satisfied by even the slightest offensive touching," it reasoned that "[h]ere we are interpreting the phrase 'physical force' as used in defining not the crime of battery, but rather the statutory category of 'violent felon[ies].'" *Id.* at 139, 140. And the Court "th[ought] it clear that in the context of a statutory definition of '*violent* felony,' the phrase 'physical force' means *violent* force—that is, force capable of causing physical pain or injury to another person." *Id.* at 140. Accord *Leocal*, 543 U.S. at 11 ("emphasis on the use of physical force against another person (or the risk of having to use such force in committing a crime), suggests a category of violent, active crimes") (interpreting "crime of violence" under 18 U.S.C. § 16).

The definition of "misdemeanor crime of domestic violence" in Section 921(a)(33)(A)(ii) is, of course, virtually identical to that in Section 924(e)(2)(B), as noted by the court of appeals below:

> For its part, § 924(e)(2)(B)(i) defines a "violent felony" in part as a crime "that has as an element the use, attempted use, or threatened use of physical force." By defining a "misdemeanor crime of domestic violence" to require "the use or attempted use of physical force," § 921(a)(33)(A)(ii) drops the reference to "threatened use" from §§ 16(a) and 924(e)(2)(B)(i) but otherwise tracks the language of §§ 16(a) and 924(e)(2)(B)(i).

Pet. App. 7a. Accordingly, "[t]he provisions' similarity supports the inference that Congress intended them to capture offenses criminalizing identical degrees of force." *Ibid.* This reading is bolstered by "the order in which Congress adopted the statutes," which suggests that Congress intentionally modeled Section 921(a)(33)(A)(ii) after Section 924(e)(2)(B)(i) and aimed to cover the same range of conduct. *Ibid.*

This reasoning surely is correct. It is fundamental that enactments like these, which use virtually identical language in closely related statutory sections that have similar purposes, "should not be read as a series of unrelated and isolated provisions." *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 570 (1995). To the contrary, it is "the normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning." *Brooke Grp. Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 230 (1993) (quoting *Sullivan* v. *Stroop*, 496 U.S. 478, 484 (1990)). See also *Mohamad* v. *Palestinian Auth.*, 132 S. Ct. 1702, 1708 (2012). This presumption yields only when the context suggests that Congress used the same word to express different meanings—that is, when "there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent." *Atl. Cleaners & Dyers, Inc.* v. *United States*, 286 U.S. 427, 433 (1932). And "[t]he burden should be on the proponents of the view" that the same term means different things in different places "to adduce strong textual support." *Gustafson*, 513 U.S. at 573. The government has not carried that burden here.

To be sure, as the government notes (at Pet. 11-12), the Court in *Johnson* left open the question whether the words "physical force" should be interpreted identically in Sections 924(e)(2)(B)(i) and 921(a)(33)(A)(ii). See 559 U.S. at 143-144. But the analysis used in *Johnson* has obvious relevance here: the operative language of the two provisions ("the use or attempted use of physical force") is identical; the Court in *Johnson* focused on the general definition of the word "force;" and both provisions address crimes of violence ("violent felony" and "misdemeanor crime of domestic violence"), which in each case has a "clear[]" "connotation of strong physical force." *Id.* at 140. Here, as in *Johnson*, the Court is considering "the phrase 'physical force' as used in defining not the crime of battery, but rather [a] statutory category of" offense with specific elements. *Ibid.* And although the government would read Section 921(a)(33)(A)(ii) as identical to the *nonviolent* common-law crime of battery because the statute addresses predicate misdemeanors rather than felonies (see Pet. 12-13), what the Court said of the definition of "violent felony" in *Johnson* is just as true here: "there is no reason to define [misdemeanor crime of domestic *violence*] by reference to a *nonviolent* misdemeanor." 559 U.S. at 142 (emphasis added). See also *United States* v. *Stevens*, 130 S. Ct. 1577, 1588 (2010) ("an unclear definitional phrase may take meaning from the term to be defined" (citing *Leocal*, 543 U.S. at 11)).

As the Sixth Circuit noted, Congress *could* have targeted Section 922(g)(9) at any "misdemeanor domestic assault or battery offense" and simply grafted the common law definition of battery into federal law. Pet. App. 12a. But it did not. Instead, Congress defined a "misdemeanor crime of domestic *violence*," echoing language and a statutory definition it had used to identify other violent offenses addressed in Sections 924(e)(2)(B)(i) and 16. It thus narrowed the field of eligible battery offenses, singling out a particularly malign class of crimes: those that have "as an element, the use or attempted use of physical force."

b. The statutory background confirms Congress's intent to use Section 921(a)(33)(A) to reach violent conduct similar to that addressed by Section 924(e)(2)(B)(i) that happened to be charged as a misdemeanor rather than a felony. Senator Lautenberg, the sponsor of the amendment that added Section 921(a)(33)(A)(ii) to the law, emphasized that the amendment was needed because "[m]any people who engage in *serious spousal or child abuse* ultimately are not charged with or convicted with felonies." 142 Cong. Rec. S8831, S8831 (1996) (statement of Sen. Lautenberg) (emphasis added).[2] The purpose of the amendment was to ensure that the prosecutor's decision to charge an offender with a misdemeanor did not take the defendant outside of the scope of the federal gun ban—and not to reach a broader range of conduct. See *id.* at S8832 ("This amendment closes this dangerous loophole and keeps guns away from violent individuals."). See also 142 Cong. Rec. S10377, S10379 (1996) (statement of Sen. Wellstone) ("If the offense is a misdemeanor, then under the current law there is a huge loophole."). Congress thus was concerned specifically with *violent* conduct. See, *e.g.*, 142 Cong. Rec. S11872, S11876 (1996) (statement of Sen. Lautenberg) ("Once he beat his wife brutally and was prosecuted, but like most wife beaters, he pleaded down to a misdemeanor."); 142

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[2] Senator Lautenberg's statements, "as those of the sponsor of the language ultimately enacted, are an authoritative guide to the statute's construction." *N. Haven Bd. of Ed.* v. *Bell*, 456 U.S. 512 (1982).

Cong. Rec. S8831, S8831 (1996) (statement of Sen. Lautenberg) ("In simple words, the amendment says that wife beaters and child abusers should not have guns.").[3]

c. In defining the statutory term as it did, Congress identified a class of criminal conduct much narrower than that covered by the common law definition of battery, which requires proof neither of violence nor of physical injury. At common law, battery is defined broadly as "an unlawful touching of another," in which it "is not necessary that the touching result in injury to the person;" whether a touching is a battery "depends on the intent of the actor, not on the force applied." *Gnadt* v. *Commonwealth,* 497 S.E.2d 887, 888 (Va. Ct. App. 1998). "[S]o jealous of the sanctity of the person" was the common law that even "the slightest touching of another, or of his clothes, or cane, or anything else attached to his person, if done in a rude, insolent, or angry manner, constitutes a battery for which the law affords redress." *Crosswhite* v. *Barnes*, 124 S.E. 242, 244 (Va. 1924); see, *e.g.*, *United States* v. *Lewellyn*, 481 F.3d 695, 698 (9th Cir. 2007) (cataloguing decisions demonstrating that "noninjurious but intentional, offensive contact (even if relatively minor) satisfies the requirement for simple assault under the battery theory" at common law); *State* v. *Maier*, 99 A.2d 21, 24 (N.J. 1953) (quoting 1 William Hawkins, Pleas of the Crown 134) ("It seems that any injury whatsoever, be it never so small, being actually done to the person of a man, in an angry, or revengeful, or rude, or insolent manner, as by spitting in his face, or any way touching him in anger, or violently justling him out of the way, are batteries in the eye of the law."). This broad scope of common-law battery—extending to impolite behavior like spitting—belies the government's contention that Congress intended to "track[]" that definition in Section 921(a)(33)(A). Pet. 12.

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[3] Misdemeanor crimes of domestic violence were originally defined merely as crimes of violence against family members. The definition was changed because "[s]ome argued that the term crime of violence was too broad, and could be interpreted to include an act such as cutting up a credit card with a pair of scissors." 142 Cong. Rec. S11872, S11877 (1996) (statement of Sen. Lautenberg). The decision to instead focus on crimes involving the use of physical force reflected Congress's desire to focus specifically on the use of actual violence against a family member, rather than on acts that are violent in some more abstract sense.

d. Citing the dissent in *Johnson*, the government maintains that the Sixth Circuit's approach, if applied nationwide, would effectively leave Section 922(g)(9) inapplicable in many jurisdictions because "generic assault and battery laws of about half the States do not draw distinctions between different degrees of force." Pet. 13-14. But as the government recognizes (at Pet. 14 n.6), in such jurisdictions the "modified categorical approach" may allow the use of record material to identify the type of force actually used by the defendant, and thus to establish that he or she committed a crime of "domestic violence." See *Johnson*, 559 U.S. at 144-145 (citing *Chambers v. United States,* 555 U.S. 122, 127-128 (2009); *Shepard* v. *United States,* 544 U.S. 13, 26 (2005) (plurality opinion); *Taylor v. United States,* 495 U.S. 575, 602 (1990)).

If it is clear that such material is necessary to trigger application of Section 922(g)(9), it can be anticipated that prosecutors in those jurisdictions will take care to include a sufficient level of detail in charging, plea, or related documents. As the Court has noted, "the Government has in the past obtained convictions under the Armed Career Criminal Act in precisely this manner." *Id.* at 144. See, *e.g.*, *United States* v. *Rede-Mendez*, 680 F.3d 552, 560 (6th Cir. 2012). Moreover, States that are concerned about the issue raised by the government remain free to amend their assault statutes so as to require proof of elements that will trigger application of Section 922(g)(9).

In any event, this consideration of policy should not preclude application of Section 921(a)(33)(A)(ii) according to its plain terms. As the Court also observed in *Johnson*:

> It may well be true, as the Government contends, that in many cases state and local records from battery convictions will be incomplete. But absence of records will often frustrate application of the modified categorical approach—not just to battery but to many other crimes as well. See, *e.g.*, *Shepard, supra,* [544 U.S.] at 22-23 * * * (burglary). It is implausible that avoiding that common-enough consequence with respect to the single crime of battery, under the single statute that is the Armed Career Criminal Act, caused Congress to import a term of art that is a comical misfit with the defined term "violent felony."

559 U.S. at 145. Precisely the same reasoning governs here.

2. *An offense need not involve the use of force to cause bodily injury.*

a. The government also insists that an offense that "results in bodily injury necessarily has, as an element, the use of 'physical force'"—indeed, necessarily involves use of "a heightened degree of force." Pet. 14-15. This is so, the government continues, because, "[a]s a matter of ordinary usage, the defendant's 'use' of 'physical force' is an 'element' of the offense of domestic assault by causing bodily injury because physical force is the means by which injury is necessarily produced." Pet. 15.

There is, however, nothing ordinary about the government's linguistic gymnastics. The offense defined by Section 922(g)(9) requires as an element the defendant's *use* of physical force. And as the Court has explained, "use" is a term that connotes direct, as opposed to indirect, action: "the use or attempted use of physical force" (18 U.S.C. § 921 (a)(33)(A)(ii)) is a phrase that "relates to the use of force, not to the possible effect of a person's conduct." *Leocal*, 543 U.S. at 10 n.7. See *id.* at 9 (citing *Bailey* v. *United States*, 516 U.S. 137, 144 (1995)) ("use" in the definition of "crime of violence" means "active employment"). Thus, statutory "emphasis on the use of physical force against another person * * * suggests a category of violent, active crimes." *Id.* at 11. Accordingly, as Judge Moore explained in her concurrence below, "[f]ollowing [*Johnson*'s] analysis, it is not enough to look only at the *result* of the defendant's conduct; instead, the focus must be on the nature of the force proscribed by the statute and whether the *conduct itself* necessarily involves violent force." Pet. App. 22a.

Yet to use the familiar examples recited by the government (see Pet. 16-17), in ordinary usage no one would say that a defendant who tricked another into drinking poison or walking off a cliff "used force" to injure the victim, even though that defendant most certainly *did* cause the victim bodily injury. The defendant in such a case would much more naturally be described as having "used trickery" rather than "force" to cause injury. Of course, as the government observes (Pet. 15-16), at some level *everything* that happens in the physical world is the product of the application of force; the victim of poison is tricked into employing force to lift the strychnine to his lips, while the victim who falls from a cliff is injured by the application of gravitational force—"a cause of the acceleration of mass" (*Johnson*, 559 U.S. at 139)—as she hits the ground. But the simple fact that force was involved in producing the victim's injury cannot be enough to establish that the defendant "used" force as an element of the crime. If it were, the Section 921(a)(33)(A)(ii) definition would be satisfied in literally *every* case and would add nothing at all to the statute.[4]

In arguing to the contrary, the government observes that the common-law definition of battery reached "indirect as well as direct uses of force," including such crimes as poisoning or telling "'a blind man walking toward a precipice that all is clear ahead.'" Pet. 17. But the government is here assuming its conclusion; its examples simply highlight the way in which the common-law understanding of battery *departs* from the express statutory definition. The government's observation thus reinforces the conclusion that it does not make sense to read the latter in light of the former.

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[4] It may be that a person who persuades another to injure him- or herself has used "intellectual force or emotional force." *Johnson*, 559 U.S. at 138. But the Court explained in *Johnson* that Section 924(e)(2)(B)(1) "plainly refers to force exerted by and through concrete bodies." *Ibid.*

b. That conclusion is fatal to the government's argument: if it is *possible* to commit the state-law misdemeanor of causing bodily injury to another without the defendant "using force," that offense necessarily cannot have, "*as an element*, the use or attempted use of physical force." An "element" is a "factual predicate[] of an offense that [is] specified by law and *must* be proved to secure a conviction." Office of Legal Counsel, United States Department of Justice, *When a Prior Conviction Qualifies As a "Misdemeanor Crime of Domestic Violence,"* at 2 (May 17, 2007), 2007 WL 3125588 (hereinafter "OLC Memo") (citing *Patterson* v. *New York*, 432 U.S. 197, 210 (1977); *Richardson* v. *United States*, 526 U.S. 813, 817 (1999); BLACK'S LAW DICTIONARY 538 (7th ed. 1999) (emphasis added)). As the Office of Legal Counsel recognized in a memorandum on the very question at issue here, "[i]f conviction of a given offense can be secured without proof of a certain fact, then that fact is not an element of that offense." OLC Memo at 3. See *ibid.* (citing *United States* v. *Vargas-Duran*, 356 F.3d 598, 605 (5th Cir. 2004) ("If any set of facts would support a conviction without proof of that component, then the component most decidedly is not an element—implicit or explicit—of the crime."); *Singh* v. *Ashcroft*, 386 F.3d 1228, 1231 (9th Cir. 2004) ("An element of a crime is a constituent part of the offense which must be proved by the prosecution *in every case* to sustain a conviction under a given statute.") (internal quotation marks omitted); *United States* v. *Fulford*, 267 F.3d 1241, 1250 (11th Cir. 2001) ("At common law, the word 'element' refers to a constituent part[] of a crime which must be proved by the prosecution to sustain a conviction.") (internal quotation marks omitted); *United States* v. *Jones*, 235 F.3d 342, 347 (7th Cir. 2000) (holding that assault and battery conviction is not a "crime of violence" under Sentencing Guidelines as "actual, attempted, or threatened physical force is not a necessary element")).

Here, the Tennessee misdemeanor statute does not have, as an element, the use or attempted use of force in the relevant, active sense. As the district court explained below:

> The text of [the Tennessee statute] indicates that one may violate the statute without the "use of physical force." For instance, one could cause a victim to suffer bodily injury by deceiving him into drinking a poisoned beverage, without making contact of any kind, let alone violent contact, with the victim. * * * Alternatively, one could coerce the victim into taking the drink.

Pet. App. 41a. The government does not deny that such conduct would support a conviction for misdemeanor domestic assault in Tennessee—although, for the reasons we have explained, it would not involve the "use of physical force."

There is, moreover, no doubt that it is possible to commit the Tennessee misdemeanor offense without the use of *violent* force. As the court below recognized, "the statute does not require proof of a serious physical injury." Pet. App. 17a; see *id.* at 18a-19a.

Respondent "could have caused a slight, nonserious physical injury with conduct that cannot be described as violent. [He] may have been convicted for causing a minor injury such as a paper cut or a stubbed toe." *Id.* at 17a. And "[a] * * * defendant need not necessarily use '*violent*' and 'strong physical force' to cause a cut, an abrasion, or a bruise" (*id.* at 19a (quoting *Johnson*, 559 U.S. at 140))—although the infliction of such injuries does support conviction under the Tennessee assault statute.

The government does not disagree, but suggests that the possibility of conviction absent serious injury is immaterial because *Johnson* "did not require a degree of force capable of causing 'serious' physical pain or 'serious' injury to another person." Pet. 18. That requirement, however, is the plain import of the statutory language. Section 922(g)(9) is directed at crimes of "violence," just as Section 924(e)(2)(B)(i) concerns "violent felon[ies]," and a "violent" action ordinarily is understood to be one that involves "great force" or that is "[m]arked by intensity." THE AMERICAN HERITAGE DICTIONARY 1994 (3d ed. 1992). Accord, *e.g.*, WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY 1289 (1984) ("[c]haracterized or caused by great physical force or rough action"). In ordinary usage, the choice of that language to create an offense committed by causing a stubbed toe would be "a comical misfit." *Johnson*, 559 U.S. at 145.

b. Pointing to *Gonzales* v. *Duenas-Alvarez*, 549 U.S. 183 (2007), and *Moncrieffe* v. *Holder*, 133 S. Ct. 1678 (2013), the government finally declares it beside the point that a defendant *could* be convicted under the Tennessee statute even when he or she did not use force (or violent force) because there must be a "'realistic probability,' and not just a 'theoretical possibility,' that the state statute would be applied in a 'nongeneric' way." Pet. 18-19. But Section 921(a)(33)(A)'s specification of the use of physical force as a required "element" of the offense means that the government's authorities are not on point.

In both *Duenas-Alvarez* and *Moncrieffe*, the Court considered whether a state crime was substantially different from a "generic" crime referenced in a federal statute. In *Duenas-Alvarez*, for example, the question was "whether the term 'theft offense' in [a] federal statute includes the crime of '*aiding and abetting*' a theft offense." 549 U.S. at 185. Unlike Sections 921(a)(33)(A) and 924(e)(2)(B)(i), the relevant federal statute in *Duenas-Alvarez* did not list specific elements—or any other specific features—that were required for a state law to fall within its reach. See 8 U.S.C. § 1101(a)(43)(G). Thus, as the Court noted, the question was simply whether a state law had "something *special*" that distinguished it from an ordinary theft offense. *Duenas-Alvarez*, 549 U.S. at 821. For purposes of that analysis, a hypothetical conviction is irrelevant: it does nothing to show that a statute describes a special or unusual "theft offense" that is different from the generic offense found in other state laws. But in the analysis of a state offense for purposes of Section 922(g)(9), a hypothetical conviction surely can show whether particular conduct is required under every application of the statute—that is, whether that conduct is in fact "an element" of the offense.

Other considerations also undermine the government's argument. Unlike the very traditional state offenses considered in *Duenas-Alvarez* and *Moncrieffe*—theft and drug trafficking, respectively—the state offense in this case is relatively new.

Tennessee traditionally used its generic assault statute to prosecute domestic violence and did not enact its special domestic violence statute until 2000. See Tenn. Public Acts, Ch. No. 824 (2000). As a consequence, comparatively few reported cases have applied the statute at issue here, and it is difficult to predict exactly how the statute will be applied in the future. There is, as always, the additional problem that it is hard to observe how the statute is applied in state trial courts, where most indictments result in plea bargains. Finally, individuals in Tennessee *have* been prosecuted under the misdemeanor domestic violence statute for injuries involving minimal force. See, *e.g.*, *State* v. *Wachtel*, 2004 WL 784865, at *12 (Tenn. Crim. App. 2004) (upholding conviction because "the appellant 'tried to slap his hands at [the victim's] arms to keep them away from him' and the slaps 'caused some scratches and bruises'").[5] In these circumstances, the possibility that the Tennessee assault statute could be applied even absent the use of force by the defendant means that it is not a "misdemeanor crime of domestic violence" within the meaning of Section 922(g)(9).

B. The Government's Assertion Of A Conflict In The Circuits Does Not Warrant Review.

The government also asserts that the decision below implicates two conflicts in the circuits: on (1) whether use of "violent" force is necessary for an offense to qualify as misdemeanor crime of domestic violence; and (2) whether the offense of assault "by causing bodily injury" necessarily has, as an element, the use of physical force. Pet. 20-23. But these asserted conflicts are not currently well developed. Review by this Court to resolve them is not necessary at this time.

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[5] The government's own "sampling" of Tennessee cases indicates, with a certain lack of specificity, only that that domestic assault prosecutions "typically" involve serious injuries. Pet. 18 n.8.

1. The government is correct that, before this Court's decision in *Johnson*, the circuits were divided on the question whether only offenses involving the use of "violent" force are covered by Section 922(g)(9). Pet. 20-21. But as the government itself recognized in recently opposing review of a decision of the First Circuit that presented a question substantially similar to the one here (*United States* v. *Booker*, 644 F.3d 12 (1st Cir. 2011)),"[a]lthough courts of appeals have disagreed about [whether Section 922(g)(9) applies to mere offensive touching], the disagreement pre-dates [*Johnson*], and few courts of appeals have had occasion to consider the issues in light of this Court's decision in that case." U.S. Br. in Opp., at 10, *Booker* v. *United States*, 132 S. Ct. 1538 (2012) (No. 11-6765). Therefore, the government continued, "the issue would benefit from further ventilation in the courts of appeals in light of *Johnson*." *Id.* at 18. The Court followed the government's guidance and denied review in *Booker*. See 132 S. Ct. 1538 (2012) (denying certiorari).

Since the Court denied certiorari in *Booker*, the courts of appeals have decided only two cases involving Section 922(g)(9). One was another decision of the First Circuit that simply followed *Booker* and pre-*Booker* First Circuit authority with minimal additional analysis. *United States* v. *Armstrong*, 706 F.3d 1, 5-6, (1st Cir. 2013), petition for cert. filed, No. 12-10209 (May 6, 2013). That decision hardly provided the "further ventilation" sought by the government.

The other is the decision below in this case, where the Sixth Circuit agreed with the Fourth Circuit's holding in *United States* v. *White*, 606 F.3d 144 (4th Cir. 2010), the only other court of appeals' decision to address the issue after *Johnson* but before *Booker*. In *White*, the Fourth Circuit held that there is "little, if any, distinction between the 'physical force' element in a 'crime of *violence*' in § 16 under *Leocal*, a '*violent* felony' under § 924(e) in *Johnson* and a 'misdemeanor crime of domestic *violence*' in § 922(g)(9)." *Id.* at 153. That court, like the Sixth Circuit here, found "no principled basis upon which to say a 'crime of domestic *violence*' would include *nonviolent* force such as offensive touching in a common law battery." *Ibid.*

In these circumstances, the Court's consideration of the question presented here is premature. If other courts of appeals follow the Fourth and Sixth Circuits in their application of *Johnson*, it is possible that the First Circuit will reconsider its pre-*Johnson* precedent. And even if the First Circuit adheres to its outlier position and this Court ultimately finds it necessary to address the issue, it would benefit from additional consideration by the courts of appeals of *Johnson*'s significance for prosecutions under Section 922(g)(2).

2. The government also maintains that "[t]he First and Eighth Circuits have held that bodily-injury assault necessarily involves the use of physical force within the meaning of Section 921(a)(33)(A)(ii)," and that those decisions conflict with the holding below in this case and with the

Fifth Circuit's decision in *United States* v. *Hagen*, 349 F. App'x 896 (5th Cir. 2009), cert. denied, 131 S. Ct. 457 (2010). Pet. 22 (citing *United States* v. *Nason*, 269 F.3d 10 (1st Cir. 2001); *United States* v. *Smith*, 171 F.3d 617 (8th Cir. 1999)). There is reason to question whether this asserted conflict in the circuits actually differs from the first conflict propounded by the government here, on the need for "violent" force; the government cites both *Nason* and *Smith* to establish the first conflict (see Pet. 20), and a determination that violent force is (or is not) necessary for conviction under Section 922(g)(9) would seem to resolve this purported second conflict as well. But the government's contention is, in any event, incorrect on its own terms.

It is true that the Maine assault statute held by the First Circuit in *Nason* to fall within Section 922(g)(9) criminalized "causing bodily injury," which was defined as "physical pain, physical illness or an impairment of physical condition." *Nason*, 269 F.3d at 12, 18. But that statute had been interpreted by the Maine courts as a matter of *state law* to require "'the *use of unlawful force against another* causing bodily injury.'" *Id.* at 20 (emphasis added). The First Circuit accordingly had no difficulty holding, in a single paragraph of conclusory analysis, that the bodily-injury prong of the Maine assault statute—which thus required the use of force to inflict physical pain or injury—"unambiguously involves the use of physical force." *Ibid.* Being bound by the state-court determination that conviction of assault under Maine's assault law requires use of force, the First Circuit had no occasion to, and did not, address the question whether statutes directed at infliction of bodily injury that lack such a requirement nevertheless necessarily must involve the use of force.

As for the Eight Circuit's decision in *Smith*, the totality of the court's analysis consisted of its noting that the complaint alleged that the defendant "grabbed [the victim] 'by the throat, and did also push her down;'" was charged "for committing an act intended to cause pain, injury, or offensive or insulting physical contact;" and "[a]s such, [he] was charged, and pleaded guilty to, an offense with an element of physical force within the meaning of" Section 921(a)(33)(A)(ii). 171 F.3d at 621. The court gave no indication that it considered and rejected the possibility that bodily injury could be inflicted without the use of force, and offered no explanation for its conclusion. This is a very slender reed on which to base an assertion of an irreconcilable conflict in the circuits.[6]

In fact, the government recognizes that the Court denied its petition seeking review of this asserted conflict in *United States* v. *Hagen*, 131 S. Ct. 457 (2010). Pet. 23 n.9. Its petition in this case relies on the same decisions of the First and Eighth Circuits (*Nason* and *Smith*) as did its petition in *Hagen*. Since that time, the law has not changed in any material way that favors the government's position. Review is no more appropriate now than it was then.

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[6] The government indicates that decisions of the Seventh Circuit interpreting 18 U.S.C. § 16(a) hold that the crime of causing bodily injury necessarily involves the use of physical force. Pet. 22-23. The government acknowledges, however, that the Seventh Circuit also has held that "force must 'be violent in nature' in the context of defining a 'crime[] of domestic violence' under 8 U.S.C. § 1227(a)(2)(E)." Pet. 20-21. These divergent decisions, involving statutes *other* than Section 922(g)(9), suggest that the law in the Seventh Circuit regarding the statute at issue in this case cannot be regarded as settled.

3. The government is wrong, moreover, in maintaining that the division in the courts of appeals that it asserts is causing significant problems in the administration of federal law. Pet. 23-26. We have explained that Section 922(g)(9) would not be "rendered largely inoperative" (Pet. 24) by the holding below. See pp. 13-14, *supra*. Prosecution remains possible under the modified categorical approach and, even if that were not the case, the government's complaint would not justify departure from the plain terms of the statute. And although the government maintains that divergent approaches in the courts of appeals "are likely to be a source of confusion for law enforcement and defendants alike" (Pet. 25), the government is unable to point to any actual difficulty in the administration of federal law, or any prosecutions actually triggered by misunderstanding of which rule applies in a defendant's state of residence—even though the conflict identified by the government long predates the decision in *Johnson*. The theoretical concerns raised by the government do not militate in favor of further review.

4. Finally, review of the question presented by the government necessarily would raise an issue that respondent previously presented in his own unsuccessful petition for certiorari. After respondent was indicted for the present offense under Section 922(g)(9), a divided state appellate court, reversing the decision of a state trial court, denied respondent's request to set aside his initial state-law plea of guilty to domestic assault—even though respondent had not been counseled, as required by Tennessee law, that it could be a federal crime for a person con-

victed of certain domestic violence offenses to own a firearm. See Tenn. Code Ann. § 40-13-109(b). Respondent contended that refusal to allow him to set aside his initial plea in such circumstances was fundamentally unfair and violated his federal constitutional rights. See No. 10-9795, *Castleman* v. *State of Tennessee*. And surely, respondent's plea cannot be regarded as knowing and intelligent when it was revealed, long after the fact, to potentially carry such severe consequences. For this reason as well, further review of the government's contention in this case is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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REPLY
BRIEF

RECORD
AND
BRIEFS

Supreme Court, U
FILED
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SUPREME COURT

No. 12-1371

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

JAMES ALVIN CASTLEMAN

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

No. 12-1371

UNITED STATES OF AMERICA, PETITIONER

v.

JAMES ALVIN CASTLEMAN

ON PETITION FOR A WRIT OF CERTIORARI
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REPLY BRIEF FOR THE UNITED STATES

The Sixth Circuit held that a person convicted of misdemeanor domestic assault by intentionally and knowingly causing bodily injury to a family member has not been convicted of a "misdemeanor crime of domestic violence" under 18 U.S.C. 922(g)(9). That decision is incorrect; it implicates two distinct (but related) conflicts among the courts of appeals; and, if allowed to stand, it (and decisions like it) will seriously impede enforcement of Section 922(g)(9). Respondent's arguments to the contrary lack merit.

1. Respondent primarily contends (Br. in Opp. 7-21) that further review is not warranted because the court of appeals' decision is correct. Several circuits disagree, see Pet. 20-23; pp. 7-11, *infra*, and that disagreement alone warrants the Court's review. Respondent's defense of the fractured decision below is flawed in any event.

Respondent relies heavily (Br. in Opp. 7-10) on this Court's decision in *Johnson* v. *United States*, 559 U.S. 133 (2010), and argues that "physical force" should have the same meaning in the context of Section 921(a)(33)(A)(ii)'s definition of "misdemeanor crime of domestic violence" as it has in Section 924(e)(2)(B)(i)'s definition of "violent felony." As respondent acknowledges (Br. in Opp. 9), however, the Court expressly reserved that question in *Johnson* and, in doing so, necessarily contemplated that the essentially identical language at issue here could bear two different meanings because of the surrounding statutory context. See 559 U.S. at 143-144. And a critical part of the Court's reasoning, which respondent does not address, relied on the "felony" nature of the term "violent felony." See *id.* at 140-142. Although the Court in *Johnson* thought it unreasonable to read "force" as having its common-law misdemeanor meaning in the definition of "violent *felony*," see 18 U.S.C. 924(e)(2)(B)(i) (emphasis added), in a statute defining "*misdemeanor* crime of domestic violence" the ordinary rule should apply: the "common-law term of art" should be "given its established common-law meaning." 559 U.S. at 139 (citation omitted).

Respondent next suggests (Br. in Opp. 10-11, 12-13) that Congress could have "simply grafted the common law definition of battery into federal law." But that is precisely what Congress did. In *Johnson*, this Court described common-law battery as a "misdemeanor" that "consisted of the intentional *application of unlawful force* against the person of another." 559 U.S. at 139, 141 (emphasis added). And, in Section 921(a)(33)(A)(ii), Congress defined "misdemeanor crime of domestic violence" as a "misdemeanor" that has, as an element, the "*use of physical force.*" 18 U.S.C. 921(a)(33)(A)(ii) (emphasis added). Respondent's further contention (Br. in Opp. 12) that common-law battery "require[d] proof neither of violence nor of physical injury" misses the point because it still required "force," *Johnson*, 559 U.S. at 139—and the meaning of that term in this context is the very question before the Court.

Respondent contends (Br. in Opp. 15-18) that even domestic assault by intentionally and knowingly causing bodily injury does not constitute a "misdemeanor crime of domestic violence" because the "use of physical force" is not an element of the offense. That, however, was not the basis for the decision below. The court of appeals did not dispute that domestic assault causing bodily injury has, as an element, the use of *some* force. Indeed, the Sixth Circuit has expressly held that aggravated assault by causing "serious physical harm * * * necessarily requires proof that the defendant used 'force capable of causing physical pain or injury.'" *United States* v. *Anderson*, 695 F.3d 390, 400 (2012); see *United States* v. *Evans*, 699 F.3d 858, 862-864 (2012) (assault by knowingly causing "physical harm" to peace officer "necessarily requires proof that a defendant knowingly used, or attempted to use, physical force capable of causing physical pain or injury").

Instead, the court of appeals held that respondent's bodily-injury domestic assault conviction does not constitute a "misdemeanor crime of domestic violence" because the crime does not have, as an element, the use of "violent" force. Pet. App. 15a-17a. Respondent's defense of that reasoning (Br. in Opp. 18-19) runs aground on this Court's decision in *Johnson*. In *Johnson*, the Court defined "violent force" as "force capable of causing physical pain or injury to another person." 559 U.S. at 140. The Tennessee domestic assault statute criminalizes "caus[ing] bodily injury." See Tenn. Code Ann. §§ 39-13-101(a)(1), 39-13-111(b) (West 2001). If force "capable" of causing physical pain or injury is "violent," as *Johnson* made clear, then so is force that actually *causes* bodily injury.

2. Respondent suggests (Br. in Opp. 11-12) that the "statutory background" supports the court of appeals' decision. That is incorrect; the court of appeals' holding would defeat the purposes of the statute revealed in its background. Congress *was* concerned with "*violent* conduct" and "*serious spousal or child abuse*." *Id.* at 11 (citation omitted). It did not want a husband who "first treated" his wife "to a fist in the face" to later "come home with a gun and take" her "life." 142 Cong. Rec. 22,987 (1996). And Congress did not want someone who "beat his wife brutally" but "pleaded down to a misdemeanor" to later "reach for the gun he keeps in his drawer." *Id.* at 26,674. But the court of appeals' decision, which respondent endorses, thwarts that undisputed purpose.[1]

The majority of domestic-violence related misdemeanor offenses would not qualify as "misdemeanor crime[s] of domestic violence" under the Sixth Circuit's approach—even where the underlying abusive conduct was "serious" or "violent" under any conceivable definition. When Congress enacted Section 922(g)(9) in 1996, "domestic abusers were (and are) routinely prosecuted under generally applicable assault and battery laws." *United States* v. *Hayes*, 555 U.S. 415, 427 (2009). And, as explained in the petition (at 24), the majority of generic, misdemeanor assault and battery statutes prohibit either the causation of bodily injury, offensive physical contact, or both. The same is generally true of the *domestic*, misdemeanor assault and battery laws on the books at the time of Section 922(g)(9)'s enactment. See, *e.g.*, 720 Ill. Comp. Stat. Ann. 5/12-3.2 (West 1996) (domestic battery); Minn. Stat. Ann. § 609.2242 (West 1996) (domestic assault); Vt. Stat. Ann. title 13, § 1042 (1996) (domestic assault). Under the court of appeals' reasoning, however, no conviction under any of those statutes would qualify as a "misdemeanor crime of domestic violence." An interpretation that would render Section 922(g)(9) close to meaningless—and that would exclude the sort of offenders Congress indisputably intended to cover—cannot be correct. See *Hayes*, 555 U.S. at 426-427.[2]

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[1] The legislative record, moreover, often refers to domestic "abuse" interchangeably with domestic "violence." See, *e.g.*, 142 Cong. Rec. at 21,438, 22,986, 25,001-25,002. And Senator Lautenberg, the amendment sponsor, refers specifically to "assault" as an example of a qualifying "domestic violence-related crime[]." *Id.* at 26,675; see Br. in Opp. 11 n.2 (describing Senator Lautenberg's statements as "an authoritative guide").

Respondent has no substantive response. He acknowledges that Congress intended to close a "huge" and "dangerous" "loophole," Br. in Opp. 11 (citations omitted), but he does not explain how the court of appeals' interpretation would achieve that objective.[3] Likewise, respondent contends that Congress intended to "narrow[] the field of eligible battery offenses" (*id.* at 10), but he does not identify a single state or federal battery statute that would qualify under his preferred definition. Instead of explaining how the statutory definition would work in practice, respondent falls back on the "modified categorical approach," arguing that courts should look to "record material to identify the type of force actually used by the defendant." *Id.* at 13-14. That is no answer at all.[4]

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[2] The practical consequences also distinguish this case from *Johnson*. Many crimes still qualify as "violent felon[ies]" because they have, as an element, the use of "violent" physical force; very few crimes will qualify as "misdemeanor crime[s] of domestic violence" if respondent's view prevails.

[3] Section 922(g)(1) already prevented persons who had been convicted of *felony* crimes of domestic violence from possessing a firearm; Section 922(g)(9) was added to capture those charged with or convicted of *misdemeanor* crimes of domestic violence.

Although the petition suggests that a modified categorical approach "may theoretically remain available" to identify instances of "violent force," Pet. 14 n.6 (citing *Johnson*, 559 U.S. at 144-145), that is no longer the case after the Court's decision in *Descamps* v. *United States*, 133 S. Ct. 2276 (2013). That decision makes clear that "sentencing courts may not apply the modified categorical approach when the crime of which the defendant was convicted has a single, indivisible set of elements." *Id.* at 2282. The "type of force actually used" will rarely, if ever, be a disjunctive element of a domestic assault or battery offense.[5] Thus, even if state prosecutors (implausibly) would "take care" to include extraneous details when charging domestic assault or battery offenses (Br. in Opp. 13-14), those details could not convert an otherwise non-qualifying offense into a "misdemeanor crime of domestic violence."[6]

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[4] The petitioners in *Armstrong* v. *United States*, petition for cert. pending, No. 12-10209 (filed May 6, 2013), concede as much. See Reply Br. at 4.

[5] The modified categorical approach would still have a role to play with respect to disjunctive elements, such as the intent requirement here. See Pet. 10 n.4. And if a state statute (like the Tennessee domestic assault statute) were to define misdemeanor assault as offensive physical contact *or* assault causing bodily injury, a court could theoretically employ a modified categorical approach to determine the defendant's crime of conviction. But where neither divisible offense qualifies as a "misdemeanor crime of domestic violence" under the governing law, the modified categorical approach adds nothing.

3. The court of appeals' decision implicates two distinct, but related, conflicts. Respondent's attempt to minimize and conflate the division among the courts of appeals is unavailing.

a. Seven circuits have considered what degree of force is necessary to conclude that a crime has, as an element, the use of "physical force" for purposes of qualifying as a "misdemeanor crime of domestic violence" under Section 922(g)(9). Four circuits (two before *Johnson* and two after) have held that "violent" physical force is required. See Pet. 20-22. Three circuits (two before *Johnson* and one before *and* after) have held that "any" physical force will suffice. *Ibid.*

Respondent acknowledges the conflict (Br. in Opp. 22-23), but contends that this Court's review would be "premature" because the First Circuit may "reconsider its pre-*Johnson* precedent." That prediction is unfounded for at least three reasons. First, the First Circuit has already declined to reconsider its pre-*Johnson* precedent on no less than four occasions. See *United States* v. *Pettengill*, No. 10-2024 (1st Cir. Aug. 19, 2013); *United States* v. *Armstrong*, 706 F.3d 1 (1st Cir. 2013), petition for cert. pending, No. 12-10209 (filed May 6, 2013); *United States* v. *Voisine*, 495 Fed. Appx. 101 (1st

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[6] Respondent's suggestion (Br. in Opp. 14) that States should "amend" their assault and battery statutes to conform to the federal definition of "misdemeanor crime of domestic violence" is an "intrusive" and unreasonable "demand," *Descamps*, 133 S. Ct. at 2293-2294 (Kennedy, J., concurring), and it cannot be what Congress anticipated when it enacted a nationwide loophole-closing statute.

Cir. 2013), petition for cert. pending, No. 12-10209 (filed May 6, 2013); *United States* v. *Booker*, 644 F.3d 12 (1st Cir. 2011), cert. denied, 132 S. Ct. 1538 (2012). Second, the First Circuit is not an "outlier." Br. in Opp. 23. The Eighth and Eleventh Circuits have also held that "violent" physical force is not required, see *United States* v. *Smith*, 171 F.3d 617, 621 & n.2 (8th Cir. 1999); *United States* v. *Griffith*, 455 F.3d 1339, 1343-1345 (11th Cir. 2006), cert. denied, 549 U.S. 1343 (2007), and neither court has reconsidered its decision in light of *Johnson*. Third, the circuit split should not be resolved by "follow[ing] the Fourth and Sixth Circuit's" *mis*application "of *Johnson*." Br. in Opp. 23. Because the circuit split is unlikely to resolve itself, and because any resolution in favor of the decision below would be incorrect, this Court's review is warranted.

b. Seven circuits have also considered whether assault by causing bodily injury necessarily involves the use of "physical force"—and four have considered that question in the context of Section 922(g)(9). See Pet. 22-23; cf. *United States* v. *Martinez-Flores*, 720 F.3d 293, 300 n.9 (5th Cir. 2013) (reaffirming that "causing bodily injury" does not mean "that the statute has as an element the use of force"). Three circuits (two in the context of Section 922(g)(9)) have held that it does; four circuits (two in the context of Section 922(g)(9)) have held that it does not. See Pet. 22-23. Respondent suggests that this circuit conflict is no different than the first and that it is, in any event, overstated. Neither contention withstands scrutiny.

The two circuit conflicts, though related, are in fact distinct. The first focuses on whether "violent" physical force is required for an offense to qualify as a "misdemeanor crime of domestic violence" under Section

922(g)(9). The second focuses on whether assault by causing bodily injury has, as an element, the use of physical force—violent or otherwise. The answer to the first question does not dictate the answer to the second, and vice versa. For example, a court could conclude (contrary to the government's position) that "violent" physical force is required, but also conclude (consistent with the government's position) that assault by causing bodily injury has, as an element, the use of such "violent" physical force. Cf. Pet. 20-21, 22-23 (citing Seventh Circuit cases adopting that approach with respect to statutes other than Section 922(g)(9)). Both questions (and conflicts) are implicated by the decision below.

Respondent's attempt to minimize the second conflict (*i.e.*, whether assault by intentionally causing bodily injury includes a use-of-force element) is unpersuasive. As respondent notes (Br. in Opp. 24), the First Circuit in *United States* v. *Nason* cited a Maine Supreme Court decision describing the bodily-injury provision of Maine's assault statute as reaching the "use of unlawful force against another causing bodily injury." 269 F.3d 10, 20 (2001) (quoting *State* v. *Griffin*, 459 A.2d 1086, 1091 (Me. 1983)). The court in *Griffin* did not, however, suggest that bodily-injury assault under Maine law is limited to some acts involving the intentional or knowing infliction of bodily injury but not others, and the Maine Supreme Court has repeatedly described the "elements" of bodily-injury assault without mention of the "use of unlawful force." See, *e.g.*, *State* v. *Gantnier*, 55 A.3d 404, 408 (Me. 2012); *State* v. *Filler*, 3 A.3d 365, 373 (Me. 2010); cf. Reply Br. at 4-5, *Armstrong*, *supra* (No. 12-10209). The conclusion that all such acts necessarily involve the "use of unlawful force" is consistent with the prevailing use of that phrase in describing the common-law crime of battery and with the government's argument here. See Pet. 12, 17.

Respondent also observes (Br. in Opp. 25) that the Eighth Circuit's analysis in *Smith* is brief. That is true, but the court's holding is still clear: assault by intentionally causing bodily injury necessarily involves the use of physical force within the meaning of Section 921(a)(33)(A)(ii). See *Smith*, 171 F.3d at 620-621; see also *United States* v. *Amerson*, 599 F.3d 854, 855 (8th Cir. 2010) (per curiam) (relying on *Smith* and holding that the portion of Nebraska's domestic-assault statute prohibiting "intentionally and knowingly caus[ing] bodily injury" satisfies "the force requirement of 18 U.S.C. § 921(a)(33)(A)(ii)") (alteration in original).

In the end, assault by intentionally causing bodily injury will satisfy the use-of-force element in the First, Seventh, and Eighth Circuits, but not in the Second, Fifth, Sixth, or Tenth Circuits. This Court's intervention is needed to resolve that conflict.

c. Respondent also suggests (Br. in Opp. 22, 25-26) that the Court should not review the two existing circuit conflicts because the government opposed review of the first conflict in *Booker*, and this Court denied review of the second in *United States* v. *Hagen*, 131 S. Ct. 457 (2010). In *Booker*, however, the government recognized that "the [first] conflict may merit review in an appropriate case." U.S. Br. in Opp. at 9, *Booker*, 132 S. Ct. 1538 (2012) (No. 11-6765). Since then, the Sixth Circuit has addressed both conflicts in the fractured decision below and the First Circuit has again reaffirmed its pre-*Johnson* precedent. This petition is also a better vehicle than both *Booker* and *Hagen*. Unlike *Booker*, this case does not present the question whether "reckless" conduct is included within the definition of a "misdemeanor crime of domestic violence." Pet. 10 n.4. That question does not independently warrant review. And unlike *Booker* and *Hagen*, this case presents two related and important circuit conflicts involving state statutes criminalizing "bodily injury" assault, as well as those criminalizing "offensive physical contact." See also U.S. Br. at 18-19, *Armstrong*, petition for cert. pending (No. 12-10209) (making the same observations).

4. Finally, respondent halfheartedly suggests that the state court's failure to set aside respondent's domestic assault conviction counsels against review. It does not. After the indictment in this case, respondent sought state post-conviction relief, arguing that his 2001 guilty plea was not knowing or voluntary because he was not informed of the federal gun prohibition, as required by Tennessee law. The Tennessee appellate court denied respondent's claim as untimely and this Court denied certiorari. See *State* v. *Castleman*, No. W2009-1661, 2010 WL 2219543 (Tenn. Crim. App. May 27, 2010), cert. denied, 131 S. Ct. 2964 (2011). The state court conviction, moreover, had not been set aside at the time respondent possessed the firearms underlying his Section 922(g)(9) conviction and any belated collateral attack would be foreclosed by *Lewis* v. *United States*, 445 U.S. 55, 60-65 (1980). See Pet. App. 61a. Further review of that issue is not warranted.

* * * * *

For the foregoing reasons, and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

SEPTEMBER 2013

JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI FILED: MAY 17, 2013
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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Docket No. 10-5912

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

JAMES ALVIN CASTLEMAN, DEFENDANT-APPELLEE

DOCKET ENTRIES

DATE	PROCEEDINGS
7/30/10	Criminal Case Docketed. Notice filed by Appellant USA. Transcript needed: y. (CB)
	* * * * *
2/18/11	APPELLANT BRIEF filed by Mr. Daniel T. French for USA. Certificate of Service: 02/18/2011. Argument Request: requested. (DTF)
	* * * * *
4/20/11	APPELLEE BRIEF filed by Mr. Steven L. West for James Alvin Castleman. Certificate of Service: 04/20/2011. Argument Request: requested. (SLW)
4/28/11	REPLY BRIEF filed by Attorney Mr. Daniel T. French for Appellant USA. Certificate of Service: 04/28/2011. (DTF)
	* * * * *

DATE	PROCEEDINGS
8/18/11	CAUSE SUBMITTED on briefs to panel consisting of Judges Moore, Clay and McKeague. (KSC)
	* * * * *
9/19/12	OPINION and JUDGMENT filed: The judgment of the district court is AFFIRMED. Decision for publication pursuant to local rule 206. Karen Nelson Moore (CONCURRING), Eric L. Clay (AUTHORING), and David W. McKeague (DISSENTING), Circuit Judges. (CL)
	* * * * *
11/8/12	PETITION for en banc rehearing filed by Mr. Kevin G. Ritz for USA. Certificate of Service: 11/08/2012. (KGR)
	* * * * *
11/29/12	RESPONSE in opposition filed regarding a petition for en banc rehearing, [4731335-2]; previously filed by Mr. Kevin G. Ritz in 10-5912. Response from Attorney Mr. Steven L. West for Appellee James Alvin Castleman Certificate of Service: 11/29/2012. (SLW)
12/19/12	ORDER filed denying petition for en banc rehearing [4731335-2] filed by Mr. Kevin G. Ritz. Karen Nelson Moore, Eric L. Clay, and David W. McKeague, Circuit Judges. (BLH)

DATE	PROCEEDINGS
1/7/13	MANDATE ISSUED with no costs taxed. (CB)

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
(Memphis)

Docket No. 2:08-cr-20420-JPM-cgc-2

JAMES ALVIN CASTLEMAN, DEFENDANT

v.

UNITED STATES OF AMERICA, PLAINTIFF

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
12/17/08	1	INDICTMENT as to Leishia Dawn Castleman (1) count(s) 1-3, James Alvin Castleman (2) count(s) 4-5. (jae) (Entered: 12/17/2008)
		* * * * *
8/18/09	45	SUPERSEDING INDICTMENT as to Leishia Dawn Castleman (1) count(s) 1s-3s, James Alvin Castleman (2) count(s) 1s-3s, 4s-5s. (jae) (Entered: 08/18/2009)
8/18/09	46	Redacted Superseding Indictment as to Leishia Dawn Castleman, James Alvin Castleman. (jae) (Entered: 08/18/2009)
		* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
9/8/09	52	MOTION to Dismiss (*Proposed Order Submitted*) by James Alvin Castleman. (Attachments: # 1 Exhibit Castleman Circuit Court Order, # 2 Exhibit Ross Federal Court Order) (West, Steven) (Entered: 09/08/2009)
		* * * * *
9/8/09	54	ORDER REFERRING MOTIONS as to James Alvin Castleman. 52 Motion to Dismiss Indictment Pursuant to Rule 12(b) filed by James Alvin Castleman & 53 Motion to Dismiss Indictment for Want of Venue, and/or in the Alternative, Motion to Transfer Case form the Western Division to the Eastern Division of the WDTN filed by James Alvin Castleman referred to Magistrate Judge Charmaine G. Claxton for Report and Recommendation. [TEXT ORDER—NO IMAGE ASSOCIATED]. Signed by Chief Judge Jon Phipps McCalla on 9/8/2009. (McCalla, Jon) (Entered: 09/09/2009)
		* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
11/5/09	67	RESPONSE to Motion by USA as to James Alvin Castleman re 52 MOTION to Dismiss (*Proposed Order Submitted*) (Attachments: # 1 Exhibit Exhibit A—Indictment 01CR1672, # 2 Exhibit Exhibit B—Judgment 01CR1672, # 3 Exhibit Exhibit C—Transcript, # 4 Exhibit Exhibit D—Order Granting Set Aside, # 5 Exhibit Exhibit E—US v. Jay Ross 00-20197-GV)(French, Daniel) (Entered: 11/05/2009)
		* * * * *
12/9/09	80	REPLY TO RESPONSE to Motion by James Alvin Castleman re 67 Response to Motion, 62 Response to Motion (West, Steven) (Entered: 12/09/2009)
12/10/09	81	Minute Entry for proceedings held before Magistrate Judge Charmiane G. Claxton. Motion Hearing as to James Alvin Castleman held on 12/10/2009 re 53 MOTION to Dismiss for Lack of Jurisdiction and 52 MOTION to Dismiss filed by James Alvin Castleman. Counsel for parties present. Defendants counsel states that the under-

DATE	DOCKET NUMBER	PROCEEDINGS
		lying state case is still pending. The matter is currently on appeal. Counsel for both parties gave argument. Governments position is that the underlying charge is still present therefore making the Federal charge valid. Defendants argument is that the State of Tennessee has set aside the charge. The Court will take the matter under advisement and enter the Report and Recommendation. (AUSA: D. French. Defense Counsel: S. West for J. Castleman & N. Germany for L. Castleman.) (Court Reporter Nicole Warren.) (cas) (Entered: 12/11/2009)
		* * * * *
2/4/10	88	REPORT AND RECOMMENDATIONS as to James Alvin Castleman re 52 MOTION to Dismiss pursuant to Rule 12(b); 53 MOTION to Dismiss for want of venue. Objections to R&R due by 2/18/2010. Signed by Magistrate Judge Charmiane G. Claxton on 02/04/2010. (Claxton, Charmiane) (Entered: 02/04/2010)

DATE	DOCKET NUMBER	PROCEEDINGS
		* * * * *
2/22/10	90	ORDER ADOPTING REPORT AND RECOMMENDATIONS as to James Alvin Castleman. The time period for objections to the Report and Recommendation having expired, and no objections having been filed, it is therefore ORDERED, ADJUDGED, AND DECREED that the Report and Recommendation of the Magistrate Judge is ADOPTED and the Court hereby DENIES both the Defendants Motion to Dismiss Indictment Pursuant to Rule 12(b) and Motion to Dismiss Indictment for Want of Venue, and/or in the Alternative, Motion to Transfer Case form the Western Division to the Eastern Division of the WDTN. Signed by Chief Judge Jon Phipps McCalla on 2/22/2010. (McCalla, Jon) (Entered: 02/22/2010)
		* * * * *
4/7/10	102	Second MOTION to Dismiss *Pursuant to F.R.C.P. 12b* by James Alvin Castleman. (West, Steven) (Entered: 04/07/2010)

DATE	DOCKET NUMBER	PROCEEDINGS
		* * * * *
4/8/10	105	MEMORANDUM in Support by James Alvin Castleman re 102 Second MOTION to Dismiss *Pursuant to F.R.C.P. 12b* (Attachments: # 1 Exhibit Carroll County TN Circuit Court Order) (West, Steven) (Entered: 04/08/2010)
4/14/10	106	RESPONSE in Opposition by USA as to James Alvin Castleman re 102 Second MOTION to Dismiss *Pursuant to F.R.C.P. 12b* (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D) (French, Daniel) (Entered: 04/14/2010)
4/21/10	107	REPLY TO RESPONSE to Motion by James Alvin Castleman re 106 Response in Opposition (West, Steven) (Entered: 04/21/2010)
4/30/10	108	ORDER DISMISSING COUNTS 4 AND 5 OF THE SUPERSEDING INDICTMENT AGAINST JAMES ALVIN CASTLEMAN. Signed by Chief Judge Jon Phipps McCalla on 4/30/10. (McCalla, Jon) (Entered: 04/30/2010)

DATE	DOCKET NUMBER	PROCEEDINGS
5/4/10	109	MOTION for Reconsideration, *Clarification and/or Additional Findings* by USA as to James Alvin Castleman. (Attachments: # 1 Exhibit A, # 2SEALED—Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 SEALED—Exhibit E) (French, Daniel) Modified on 5/5/2010 (jml). Document 2and 5 sealed from further viewing per request of Barbara—legal asst to AUSA French—contains personal identifiers. (Entered: 05/04/2010)
5/11/10	110	RESPONSE to Motion by James Alvin Castleman re 109 MOTION for Reconsideration, *Clarification and/or Additional Findings* (Attachments: # 1 Exhibit Order of the Carroll County Circuit Court) (West, Steven) (Entered: 05/11/2010)
		* * * * *
5/12/10	112	MOTION for Leave to File *to attach the following Transcript (Exhibit F) to the Governments Motion for reconsideration, Clarification and/or Additional Find-*

DATE	DOCKET NUMBER	PROCEEDINGS
		ings by USA as to Leishia Dawn Castleman, James Alvin Castleman. (Attachments: # 1 Exhibit F) (French, Daniel) (Entered: 05/12/2010)
		* * * * *
7/6/10	119	ORDER DENYING UNITED STATES' MOTION TO SET ASIDE ORDER. Signed by Chief Judge Jon Phipps McCalla on 7/6/10. (McCalla, Jon) (Entered: 07/06/2010)
		* * * * *
7/28/10	123	NOTICE OF APPEAL by USA as to James Alvin Castleman re 108 Order on Motion to Dismiss, 119 Order on Motion for Reconsideration (French, Daniel) (Entered: 07/28/2010)
		* * * * *
12/8/10	134	NOTICE OF FILING OF OFFICIAL TRANSCRIPT as to James Alvin Castleman held on 12/10/2009, before Judge Claxton.
		* * * * *
9/19/12	170	ORDER of USCA as to James Alvin Castleman re 123 Notice of

DATE	DOCKET NUMBER	PROCEEDINGS
		Appeal—Final Judgment. It is ORDERED that the judgment of the district court is AFFIRMED. (jld) (Entered: 09/21/2012)
		* * * * *
1/7/13	174	MANDATE of USCA (certified copy) as to James Alvin Castleman (jae) (Entered: 01/07/2013)
		* * * * *
10/1/13	192	NOTICE frm the Supreme Court of the United States that the petition for a writ of certiorari is granted by James Alvin Castleman. (jld) (Entered: 10/02/2013)

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

Superseding
Criminal No. 08-20420

UNITED STATES OF AMERICA, PLAINTIFF

v.

LEISHIA DAWN CASTLEMAN AND JAMES ALVIN CASTLEMAN, DEFENDANT

---

18 U.S.C. § 2
18 U.S.C. § 922(a)(6)
18 U.S.C. § 922(g)(9)

Filed: Aug. 18, 2009

INDICTMENT

THE GRAND JURY CHARGES:

COUNT ONE

On or about March 18, 2005, in the Western District of Tennessee, the defendants,

LEISHIA DAWN CASTLEMAN
and
JAMES ALVIN CASTLEMAN

in connection with the acquisition of firearms, that is: one (1) Rohm .22 caliber, one (1) Iver Johnson .22 caliber revolver, and one (1) Herbert Schmidt .22 caliber revolver from Harold Blow Gun Shop, a licensed dealer of firearms within the meaning of Chapter 44, Title 18, United States Code, being aided, abetted, counseled, commanded, and induced, each by the other, did knowingly make a false or fictitious statement, which statement was intended and likely to deceive Harold Blow Gun Shop as to a fact material to the lawfulness of such sale or acquisition of said firearms to the defendants under Chapter 44 of Title 18, all in violation of Title 18, United States Code, Sections 922(a)(6) and 2.

COUNT TWO

On or about March 30, 2005, in the Western District of Tennessee, the defendants,

LEISHIA DAWN CASTLEMAN
and
JAMES ALVIN CASTLEMAN

in connection with the acquisition of firearms, that is: two (2) Harrington and Richardson .22 caliber revolvers, from Harold Blow Gun Shop, a licensed dealer of firearms within the meaning of Chapter 44, Title 18, United States Code, being aided, abetted, counseled, commanded, and induced, each by the other, did knowingly make a false or fictitious statement, which statement was intended and likely to deceive Harold Blow Gun Shop as to a fact material to the lawfulness of such sale or acquisition of said firearms to the defendants under Chapter 44 of Title 18, all in violation of Title 18, United States Code, Sections 922(a)(6) and 2.

COUNT THREE

On or about April 7, 2005, in the Western District of Tennessee, the defendants,

LEISHIA DAWN CASTLEMAN
and
JAMES ALVIN CASTLEMAN

in connection with the acquisition of firearms, that is: two (2) Rohm .22 caliber revolvers, from Harold Blow Gun Shop, a licensed dealer of firearms within the meaning of Chapter 44, Title 18, United States Code, being aided, abetted, counseled, commanded, and induced, each by the other, did knowingly make a false or fictitious statement, which statement was intended and likely to deceive Harold Blow Gun Shop as to a fact material to the lawfulness of such sale or acquisition of said firearms to the defendants under Chapter 44 of Title 18, all in violation of Title 18, United States Code, Sections 922(a)(6) and 2.

COUNT FOUR

Between on or about March 18, 2005 and on or about a date unknown to the Grand Jury, in the Western District of Tennessee, the defendant,

JAMES ALVIN CASTLEMAN

who had been convicted of a misdemeanor crime of domestic violence, did knowingly possess in and affecting interstate commerce firearms, that is: three (3) Rohm .22 caliber revolvers, one (1) Iver Johnson .22 caliber revolver, one (1) Herbert Schmidt .22 caliber revolver, and two (2) Harrington and Richardson .22 caliber revolvers in violation of Title 18, United States Code, Section 922(g)(9).

COUNT FIVE

On or about April 19, 2006, in the Western District of Tennessee, the defendant,

JAMES ALVIN CASTLEMAN

who had been convicted of a misdemeanor crime of domestic violence, did knowingly possess in and affecting interstate commerce firearms, that is: one (1) Marlin .22 caliber rifle, one (1) Mossberg .20 gauge shotgun, and one (1) Davis Industries .380 caliber semiautomatic pistol in violation of Title 18, United States Code, Section 922(g)(9).

A TRUE BILL:

/s/ Grand Jury Foreperson
FOREPERSON

DATE: Aug. 18, 2009

* * * * *

CIRCUIT COURT OF TENNESSEE
FOR CARROLL COUNTY
TWENTY-FOURTH JUDICIAL DISTRICT
SITTING AT HUNTINGDON

Docket No. 01CR1672
STATE OF TENNESSEE
v.
JAMES ALVIN CASTLEMAN

Filed: July 16, 2009

ORDER ON MOTION TO SET ASIDE JUDGMENT AND AMENDED MOTION TO SET ASIDE JUDGMENT AND PETITION FOR WRIT OF HABEAS CORPUS AND PETITION FOR POST CONVICTION RELIEF AND PETITION FOR WRIT OF ERROR CORAM NOBIS

Introduction

James Alvin Castleman entered a plea of guilty in this Court to the offense of domestic assault as defined in T.C.A. § 39-13-111(b) on July 16, 2001. He received a sentence of 11 months and 29 days to be served on supervised probation pursuant to a negotiated plea agreement. Mr. Castleman was represented by Jeffrey A. Smith, Esquire, of the Gibson County Bar. The Honorable C. Creed McGinley was the presiding judge. A Judgment was entered which memorialized this matter that same day. The record reflects that Mr. Castleman successfully completed the probated sentence.

Mr. Castleman filed a Motion To Set Aside Judgment on March 13, 2009, hereinafter referred to as the original motion. This original motion was "a bare bone" effort to set aside the conviction on the basis that "his plea was not freely and voluntarily given" owing to his claim that "he was not advised that this conviction would prohibit him from carrying a firearm in the future or that, after this conviction, the possession of a firearm would constitute a felony offense." (See original motion, paragraph #2.) The State responded, shortly thereafter, via a Motion To Dismiss which, in summary, suggests that Mr. Castleman has stated no legally sufficient basis for relief. On or about May 7, 2009, Mr. Castleman filed a second pleading entitled Amended Motion To Set Aside Judgment and Petition For Writ Of Habeas Corpus and Petition For Writ Of Error Coram Nobis, hereinafter collectively referred to as the second filing.

The question presented involves the relationship of two Tennessee statutes and one federal statute. The crime of domestic assault, as established by T.C.A. § 39-13-111 is in this instance a Class A or B misdemeanor which carries punishment not to exceed a $2,500.00 fine and 11 months 29 days confinement. A federal statute makes it a crime for a person convicted of a "domestic violence" offense to possess a firearm.

18 U.S.C. § 922 (g)(9). T.C.A. § 40-14-109 requires that before a court accepts a plea of guilty from one charged with a "domestic violence offense" that the court inform the person of the additional consequences of the guilty plea which are created by federal criminal law. The precise federal statute is not identified in the Tennessee statute. The Court assumes, but does not decide, that the domestic assault alleged in the case at bar was a domestic violence offense as that term is used in the relevant statutes.

The Court scheduled an evidentiary hearing for May 11, 2009. This hearing was continued on the request of the State until July 15, 2009. At the hearing, Mr. Castleman testified that, at the time of his plea of guilty to domestic assault, he was not advised by the judge that this conviction would, as a matter of federal law, prohibit him from thereafter possessing or purchasing a firearm. The Affidavit of his attorney, Mr. Smith, was received as evidence without any objection by the State. Mr. Smith "does not recall" whether either he or the presiding judge advised Mr. Castleman of this consequence. Melissa Gurley, the chief deputy court clerk testified that no actual audio recording or transcript of the guilty plea dialogue could be located. Furthermore, she testified that the court file contained no written admonition or evidence suggesting that the warnings had been given to the defendant.

Mr. Castleman was indicted on December 17, 2008, for the federal offense of possessing a firearm following a conviction for domestic assault. This indictment was referred to during the testimony of Mr.

Castleman but not offered as an exhibit. However, the Court takes judicial notice of its filing: *United States of America v. Leisha Dawn Castleman and James Alvin Castleman*, #08-20420 in the United States District Court For The Western District Of Tennessee, Western Division.

Mr. Castleman has apparently, at all relevant times, been fully competent.

Initial Finding Of Fact

The Court has considered the evidence and the entire record in this case. The Court finds, by a preponderance of the evidence, that Mr. Castleman was not advised by the presiding judge, prior to the acceptance of his plea of guilty, of the federal prohibition for his future possession or purchase of a firearm as is required by T.C.A. § 40-14-109(b).

Theories Of Relief

Whereas, the initial filing by Mr. Castleman cited no specific procedural vehicle which was being used to attack the conviction, his second filing adopts a "shotgun" approach in which he claims that he is entitled to relief upon one or all of these alternative theories:

(a) Tennessee Rule of Criminal Procedure 32(f) which permits the withdrawal of a plea of guilty under certain circumstances;

(b) Post Conviction Relief pursuant to T.C.A. § 40-30-101 et seq.;

(c) Habeas Corpus pursuant to T.C.A. § 29-21-107; and/or

(d) Coram Nobis pursuant to T.C.A. § 40-26-105.

The courts frown on such a "shotgun" approach to pleading. (citation omitted.) However, in the interests of deciding this matter on the merits, the Court will not, sua sponte, interpose such an objection.

Analysis

Rule 32(f) of the Rules of Criminal Procedure allows a defendant to withdraw a guilty plea "before the judgment becomes final" in order "to correct manifest injustice." The judgment in a criminal case becomes final thirty days after entry. (citations omitted.) Thus, the opportunity to have withdrawn this guilty plea by virtue of this rule expired on August 17, 2001. Therefore, Mr. Castleman is not entitled to relief on the basis of Rule 32(f).

The Post Conviction Procedure Act, codified at T.C.A. § 40-30-101 et seq., provides a method for the relief from a criminal conviction which "is void or voidable because of the abridgment of any right guaranteed by the Constitution of Tennessee or the Constitution of the United States." T.C.A. § 40-30-103. However, the relief allowed is subject to a petition requesting the same having been filed "within (1) one year of the date on which the judgment became final . . . ". T.C.A. § 40-30-102. The statute of limitations can be tolled in limited circumstances by due process considerations, such as the disability of the petitioner. This Court concludes that the second filing, insofar as it alleges a basis for attack upon the conviction in the nature of a post conviction action, is time barred by the statute of limitations. The Court has reviewed those reported appellate cases which define the scope of the due process safeguard against the post conviction statute of limitations and concludes that this case does not present circumstances under which the courts of Tennessee have applied that constitutional doctrine to allow a late filed post conviction petition to proceed. *Moran v. State*, 2005 Tenn. Crim. App. LEXIS 291, filed March 29, 2005.

The second filing by Mr. Castleman also contains a habeas corpus claim. Also known as the Great Writ, this constitutional right is codified at T.C.A. § 29-12-101 through 130. These statutes narrow the common law grounds for the writ. Case law has limited the scope of the writ to instances in which the judgment under conviction is void, not merely voidable. A judgment is void if it is facially invalid because the court that entered it did not have jurisdiction or because the sentence has expired. A voidable judgment is facially valid and must be attacked by the introduction of proof beyond the face of the judgment or the records of the court which produced the judgment of conviction in order to establish its lack of validity. *Hickman v. State*, 153 S.W.3d 16 (Tenn. 2004).

In this case, the Judgment of conviction dated July 16, 2001, and all available records of those proceedings indicate that the Judgment is valid. It is, therefore, not void for purposes of habeas corpus. It may be voidable. However, a voidable criminal conviction may not be attacked by a habeas corpus action. *Hickman*, at page. 25.

Furthermore, habeas corpus relief is not available if the petitioner is not restrained, such as after a sentence has been fully served. It is not available where the original conviction may only have a collateral effect on some subsequent criminal case. *Hickman* at pages 23-24.

A petition for habeas corpus must also be verified by affidavit. T.C.A. § 29-21-107.

To the extent that the second filing states a claim upon a theory of habeas corpus, the Court concludes that relief is not available because: (a) the Judgment is not void; (b) Mr. Castleman is not restrained by the Judgment; (c) the effect of the Judgment is collateral to another proceeding; and (d) the petition seeking relief is not verified as required by statute.

Next, Mr. Castleman claims relief in the nature of a writ of error coram nobis. T.C.A. § 40-26-105. A coram nobis action may provide relief when no other avenue is available to a petitioner. It applies to cases involving errors not provable by the record, to those not litigated or which could not have been litigated at the original trial or an appeal or in a habeas corpus proceeding. *Id.*

A coram nobis action is curtailed by the impact of a one year statute of limitation. T.C.A. § 27-7-103. However, the one year statute of limitation may be tolled if the interests of the petitioner in obtaining relief clearly outweigh those of the government in bringing closure to criminal cases. *Workman v. State*, 41 S.W.3d 100 (Tenn. 2001).

A writ of error coram nobis may not be used to set aside a guilty plea *unless* the evidence reflects that the plea was not entered voluntarily or knowingly. *Newsome v. State*, 995 S.W.2d 129, 134 (Tenn. Crim. App. 1998).

This Court now makes the additional factual finding that the entry of the guilty plea by Mr. Castleman to domestic assault was "voluntary", as it was not the result of duress, but that it was not "knowing" or "intelligent" because the trial court failed to inform him of the effect of the plea on his right to possess a firearm under federal law. This result is supported by the decision in *State v. Mackey*, 553 S.W.2d 337 (Tenn. 1977). The Court also finds that had Mr. Castleman been advised of the federal prohibition relating to firearm possession, that he would not have plead guilty to domestic assault.

T.C.A. § 40-14-109(b) provides:

> **Before the Court accepts the guilty plea** of a defendant charged with a domestic violence offense, **it shall inform the defendant** that it is a federal offense for a person convicted of a domestic violence offense to possess or purchase a firearm and that from the moment of conviction for a domestic violence offense the defendant will never again be able to lawfully possess or buy a firearm of any kind. **After so informing** the defendant, **the court may accept the plea of guilty if the defendant clearly states on the record that the defendant is aware of the consequences** of a conviction for a domestic violence **and still wishes to enter a plea of guilty.** (emphasis added.)

This Court observes that this statutory directive creates an affirmative duty on the trial judge and is unambiguous. The intent of the Tennessee General Assembly is crystal clear. The trial judge may not accept a guilty plea to domestic assault until he or she has advised the accused of this specific consequence and the accused "clearly states on the record" an awareness of the consequence. *Id.* Therefore, it was improper for the trial judge to fail to so advise Mr. Castleman.

The right of the citizen to possess a firearm, while subject to rational restrictions, is afforded protection by our constitutions. *United States Constitution*, Amendment Two; Article I, Section Twenty-Six of the *Constitution of Tennessee*. See generally: *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008). However, the United States Supreme Court has not yet decreed that the Second Amendment applies to state and local government conduct. *Heller, id.*, involved federal action. See generally: *National Rifle Association of America v. City of Chicago*, 2009 WL 1515 443 (C.A.7-Ill.). In any event, the citizen is afforded, in Tennessee, additional procedural safeguards so as to protect this right by T.C.A. § 40-14-109(b).

The Court also concludes that this claim is cognizable in a coram nobis action and that the interests of Mr. Castleman, in entering an intelligent plea, outweigh the interests of the State in finality and, therefore, the statute of limitations does not bar the proceeding. The Court finds that the Tennessee General Assembly has implicitly determined that the impact of 18 U.S.C. § 922 (g)(9) as it relates to firearm possession creates further punitive consequences of a guilty plea to domestic assault. Accordingly, the Court finds that this consequence was viewed by the General Assembly to be direct in nature. See *Ward v. State*, 2009 Tenn. Crim. App. LEXIS 43, filed January 14, 2009. (Perm. cert. granted April 2009.) Therefore, the requirements of T.C.A. § 40-14-109(b) are not merely remedial or regulatory.

Conclusion

Based on the foregoing findings of fact and conclusions of law, the Court grants coram nobis relief and sets aside the Judgment of conviction in this case without prejudice to further proceedings.

The Clerk of the Court shall file this Order and forward a copy of the same by United States Mail to the Defendant through his attorney of record and the District Attorney General.

It is SO ORDERED.

Enter this 16th day of July, 2009.

/s/ DONALD E. PARISH
DONALD E. PARISH
Circuit Court Judge

STATE OF TENNESSEE, CARROLL COUNTY CIRCUIT COURT, MAY, 2001 TERM

The Grand Jurors of the State of Tennessee, duly elected, impaneled, sworn and charged to inquire in and for the body of the County of CARROLL, in the State aforesaid, upon their oath present:

That JAMES ALVIN CASTLEMAN, heretofore, to-wit: On or about the 22nd DAY OF FEBRUARY, 2001, in the County aforesaid, then and there did intentionally or knowingly cause bodily injury to JULIE POLLARD, WHO HAS A CHILD WITH HIM, thereby committing the offense of DOMESTIC ASSAULT, in violation of T.C.A. 39-13-111(b), against the peace and dignity of the States of Tennessee.

[I, Bertha Taylor, Circuit Court Clerk of Carroll County, Tennessee, do hereby certify that the above and foregoing is a true and correct copy of the original, which appears of record in my office in Minute]

[Book_____ Page_____
This 10-15 2008
Bertha Taylor, Clerk

By Sheri Boyd, D.C.]

[CARROLL COUNTY
CIRCUIT COURT
FILED
MAY 07, 2001
CASE NO. [CICR1672]

* * * * *

THE STATE OF TENNESSEE

v.

JAMES ALVIN CASTLEMAN

DOMESTIC ASSAULT
TCA 39-13-111(b)

PROSECUTOR(S)
LEE BATES

SUMMONS WITNESSES FOR THE STATE

* * * * *

BY ORDER OF

/s/ ROBERT "GUS" RADFORD
ROBERT "GUS" RADFORD
DISTRICT ATTORNEY GENERAL

[A TRUE BILL] / NO TRUE BILL

/s/ BETTY BYARS
FOREMAN OF THE GRAND JURY
CARROLL COUNTY, TENNESSEE

WITNESSES

* * * * *

/s/ BETTY BYARS
FOREMAN OF THE GRAND JURY
CARROLL COUNTY, TENNESSEE

IN THE CRIMINAL COURT OF Carroll COUNTY TENNESSEE

Case Number: 01CR1672 Count#: ________ Attorney for the State: Eleanor Cahill

Judicial District 24th Judicial Division ________ Counsel for Defendant: Jeffrey A. Smith

[✓] Retained [ ] Appointed [ ] Public Defender

State of Tennessee

vs.

Defendant: James Alvin Cathey Alias: ________

Date of Birth 11 / 15 / 68 Sex m Race W SSN 414 - 17 - 1560 01CR1672

From Indictment # ________ Warrant# ________ TDOC# ________ TBI Control # R. Baker DC

JUDGMENT

Comes the District Attorney General for the State and the defendant with counsel of record for entry of judgment. On the 16th day of July, 2001 the defendant:

[✓] Pleaded Guilty [ ] Dismissed/Nolle Prosequi

[ ] Nolo Contendere [ ] Retired/Unapprehended Defendant

[ ] Guilty Plea - Pursuant to 40-35-313

Is found: [ ] Guilty [ ] Not Guilty

[ ] Jury Verdict [ ] Not Guilty by Reason of Insanity

[ ] Bench Trial

Indictment: Class (circle one): 1st [✓ A] B C D E [ ] Felony [✓] Misdemeanor

Filing date __/__/__ Offense Domestic Assault

Amended charge None

Offense date 02/22/01 County Carroll

Conviction offense Same

TCA# 39-13-111(b) Sentence-imposed date 07/16/01

Conviction class (circle one): 1st [✓ A] B C D E [ ] Felony [✓] Misdemeanor

After considering the evidence, the entire record, and all factors in T.C.A. Title 40, Chapter 35, all of which are incorporated by reference herein, the Court's findings and rulings are:

[✓] Sentence Reform Act of 1989

Offender Status (Check one) (Other than 1st degree murder)

[ ] Mitigated
[ ] Standard
[ ] Multiple
[ ] Persistent
[ ] Career
[ ] Repeat Violent

Release Eligibility (Check one) (Other than 1st degree murder)

[ ] Mitigated 20%
[ ] Mitigated 30%
[ ] Standard 30%
[ ] Multiple 35%
[ ] Persistent 45%
[ ] Career 60%
[ ] Violent 100%
[ ] Multiple Rapist 100%
[ ] Child Rapist 100%
[ ] Repeat Violent 100%

Misc. (If applicable)
[ ] School Zone
[ ] Gang Related

[ ] 1st Degree Murder

[ ] Pre 1982

Sentence: ________

[ ] Sentence Reform Act of 1982

[ ] 30% Range 1
[ ] 35% Range 2
[ ] 40% Range 3

Concurrent with:

Consecutive to:

Sentenced to: Sentence Length:

[ ] TDOC ____ Years ____ Months ____ Life ____ Life Without Parole ____ Death

Mandatory Minimum Sentence (____ 39-17-417, 39-13-513, 39-13-514 in school zone or ____ 55-10-401 - 4th Offense)

[✓] County Jail [ ] Workhouse 0 Years 11 Months 29 Days ____ Hours ____ Weekends ____ Periodic: (________)

Mandatory Minimum Sentence (____ 39-17-417, 39-13-513, 39-13-514 in school zone or ____ 55-10-401 - 4th Offense)

Period of Incarceration to be Served Prior to Release on Probation ____Months ____Days ____Hours (Misdemeanor Only)

____% Min. Service Prior to Elig. for Work Release, Furlough, Trusty Status and Rehabilitative Prog. (Misdemeanor Only)

Supervised

[✓] Probation [ ] Diversion 0 Years 11 Months 29 Days Effective: 7-16-01

[ ] Community Based Alternative ____ Years ____ Months ____ Days ____ Hours ____ Weekends

Specify: ________

Pretrial Jail Credit period: from __/__/__ to __/__/__ from __/__/__ to __/__/__ or Number of Days: ____

Court Ordered Fees and Fines:

$________ Criminal Injuries Compensation Fund
$________ Supervision
$________ Child support
$________ Court Costs
$________ Fine Assessed
$________ Sex Offender Tax

Restitution

Victim Name ________

Address ________

Total Amount $________ $________ per month

[ ] Unpaid Community Service: ____ Hours ____ Days ____ Weeks ____ Months

[ ] The defendant having been found guilty is rendered infamous and is ordered to provide a biological specimen for the purpose of DNA analysis.

[ ] Pursuant to 39-13-524 the defendant is sentenced to community supervision for life following sentence expiration.

Special Conditions:

lertha Taylor,
Clerk of Carroll County,
nnessee, do hereby certify
t the above and foregoing
a true and correct copy o
e original, which appears
cord in my office in Minute
________ Page ________
10-15 2008
Bertha Taylor, Clerk

PETITIONER'S BRIEF

Supreme Court, U.S.
FILED
NOV 15 2013
OFFICE OF THE CLERK

No. 12-1371

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

JAMES ALVIN CASTLEMAN

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
MYTHILI RAMAN
Acting Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
MELISSA ARBUS SHERRY
Assistant to the Solicitor General
JOSEPH C. WYDERKO
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Section 922(g)(9) of Title 18, United States Code, makes it a crime for any person convicted of a "misdemeanor crime of domestic violence" to possess a firearm. The phrase "misdemeanor crime of domestic violence" is defined to include any federal, state, or tribal misdemeanor offense, committed by a person with a specified domestic relationship to the victim, that "has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon." 18 U.S.C. 921(a)(33)(A). The question presented is:

Whether respondent's Tennessee conviction for misdemeanor domestic assault by intentionally or knowingly causing bodily injury to the mother of his child qualifies as a conviction for a "misdemeanor crime of domestic violence."

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In the Supreme Court of the United States

No. 12-1371

UNITED STATES OF AMERICA, PETITIONER

v.

JAMES ALVIN CASTLEMAN

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-33a) is reported at 695 F.3d 582. The order of the district court (Pet. App. 49a-50a) adopting the report and recommendation of the magistrate judge denying respondent's motion to dismiss (Pet. App. 51a-71a) is unreported, but is available at 2010 WL 711179. The orders of the district court granting respondent's motion to dismiss (Pet. App. 34a-42a) and denying the government's motion for reconsideration (Pet. App. 43a-48a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 19, 2012. A petition for rehearing was denied on December 19, 2012 (Pet. App. 72a-73a). On March 11, 2013, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including April 18, 2013. On April 5, 2013, Justice Kagan further extended the time to May 18, 2013, and the petition was filed on that date. The petition was granted on October 1, 2013. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reprinted in an appendix to this brief. App. A, *infra*, 1a-9a.

STATEMENT

Respondent was indicted on two counts of possession of a firearm by a person convicted of a misdemeanor crime of domestic violence, in violation of 18 U.S.C. 922(g)(9), and three counts of making false or fictitious statements to a federally licensed firearms dealer in order to purchase firearms, in violation of 18 U.S.C. 922(a)(6). Concluding that respondent's prior Tennessee conviction for misdemeanor domestic assault on the mother of his child was not a conviction for a "misdemeanor crime of domestic violence," the district court dismissed the Section 922(g)(9) counts of the indictment. The court of appeals affirmed. Pet. App. 1a-33a, 54a-55a.

1. Under federal firearms laws, it is unlawful for certain persons, including any person who has been convicted of a felony in any court, "[to] possess in or affecting commerce, any firearm or ammunition." 18 U.S.C. 922(g); see *United States* v. *Hayes*, 555 U.S. 415, 418 (2009). In 1996, Congress expanded that prohibition to include persons who have been convicted in any court of a "misdemeanor crime of domestic violence." 18 U.S.C. 922(g)(9); see Treasury, Postal Service, and General Government Appropriations Act, 1997 (1997 Appropriations Act), Pub. L. No. 104-208, § 658(b)(2), 110 Stat. 3009-372. The phrase "misde-

meanor crime of domestic violence" is defined as a misdemeanor under federal, state, or tribal law, committed by a person with a specified domestic relationship with the victim, including "shar[ing] a child in common," that "has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon." 18 U.S.C. 921(a)(33)(A); see *Hayes*, 555 U.S. at 420-421. A person who knowingly violates that provision may be fined, imprisoned for not more than ten years, or both. 18 U.S.C. 924(a)(2).

2. In 2001, respondent was charged in Tennessee state court with misdemeanor domestic assault in violation of Tenn. Code Ann. § 39-13-111(b) (West 2001),[1] which punishes any person "who commits an assault as defined in [Section] 39-13-101 against a person who is that person's family or household member." A "family or household member" includes "a person who has a child * * * in common with that person." *Id.* § 39-13-111(a). Section 39-13-101(a), in turn, provides that a person commits assault by, *inter alia*, "[i]ntentionally, knowingly or recklessly caus[ing] bodily injury to another" or "[i]ntentionally or knowingly caus[ing] physical contact with another and a reasonable person would regard the contact as extremely offensive or provocative." *Id.* § 39-13-101(a)(1) and (3). "Bodily injury" is defined as "a cut, abrasion, bruise, burn or disfigurement; physi-

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[1] Unless otherwise noted, citations to the Tennessee Code Annotated are to the 2001 version. The current version of the relevant Tennessee statutory provisions similarly punish any person "who commits an assault as defined in [Section] 39-13-101 against a domestic abuse victim," and "domestic abuse victim" includes adults "who have or had a sexual relationship." Tenn. Code Ann. § 39-13-111(a)(3) and (b) (West 2013).

cal pain or temporary illness or impairment of the function of a bodily member, organ, or mental faculty." *Id.* § 39-11-106(a)(2). A first conviction for domestic assault under Section 39-13-111(b) is punishable as a Class A misdemeanor. See *id.* §§ 39-13-111(c), 39-13-101(b); see also *id.* § 40-35-111(e)(1) (authorizing a term of imprisonment not greater than 11 months and 29 days).

The state indictment alleged that respondent "did intentionally or knowingly cause bodily injury to [the victim], WHO HAS A CHILD WITH HIM, thereby committing the offense of DOMESTIC ASSAULT, in violation of T.C.A. 39-13-111(b)." J.A. 27. Respondent pleaded guilty pursuant to a plea agreement, and he was sentenced to supervised probation for 11 months and 29 days. J.A. 29; see Pet. App. 53a-54a.

3. In 2008, law enforcement agents discovered that respondent and his wife were buying firearms from dealers and selling them on the black market. See Pet. App. 2a. In August 2009, respondent was charged in a superseding indictment with two counts of possession of a firearm by a person convicted of a misdemeanor crime of domestic violence, in violation of 18 U.S.C. 922(g)(9) (Counts 4 and 5), and three counts of making false or fictitious statements to a federally licensed firearms dealer in order to purchase firearms on three separate occasions, in violation of 18 U.S.C. 922(a)(6) (Counts 1, 2, and 3). J.A. 13-16.

Respondent moved to dismiss the indictment arguing, *inter alia*, that his Tennessee domestic assault conviction is not a "misdemeanor crime of domestic violence" because it does not "ha[ve], as an element, the use * * * of physical force." 18 U.S.C.

921(a)(33)(A)(ii).[2] The district court granted the motion and dismissed the two Section 922(g)(9) counts. Pet. App. 34a-42a.[3] The court concluded that "[a]n assault statute that requires the mere causation of bodily injury does not necessarily require the 'use of physical force' for [Section] 922(g)(9) purposes, at least where the statute may be violated through coercion or deception rather than through violent contact with the victim." *Id.* at 40a. The court explained that because a person could violate the Tennessee statute by "caus[ing] a victim to suffer bodily injury by deceiving him into drinking a poisoned beverage, without making contact of any kind, let alone violent contact, with the victim," or by "coerc[ing] the victim into taking the drink," respondent's 2001 conviction "cannot serve as a qualifying misdemeanor crime of domestic violence under [Section] 922(g)(9)." *Id.* at 41a.

4. The United States appealed and a divided panel of the court of appeals affirmed in three separate opinions. Pet. App. 1a-33a.

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[2] Respondent also argued that he could not be convicted of violating Section 922(g)(9) because his domestic assault conviction had been set aside. See Pet. App. 60a-63a. After the indictment in this case, respondent sought state post-conviction relief, arguing that his 2001 guilty plea was not knowing and voluntary because he was not informed of the federal gun prohibition, as required by Tennessee law. Although a Tennessee trial court initially set aside respondent's conviction on that basis, see J.A. 17-26, an appellate court reversed and this Court denied certiorari. See *State* v. *Castleman*, No. W2009-01661, 2010 WL 2219543 (Tenn. Crim. App. May 27, 2010), cert. denied, 131 S. Ct. 2964 (2011).

[3] The district court had initially adopted the magistrate judge's report and recommendation and denied respondent's motion to dismiss based on a theory of judicial estoppel. Pet. App. 49a-71a.

a. The court of appeals first considered "the degree of force necessary for a misdemeanor domestic battery offense to qualify as a misdemeanor crime of domestic violence." Pet. App. 5a. The court explained that because the definition of "misdemeanor crime of domestic violence" largely "tracks" the "violent felony" definition in the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(2)(B)(i), Congress presumably "intended them to capture offenses criminalizing identical degrees of force." Pet. App. 6a-7a. The court of appeals further explained that, in *Johnson* v. *United States*, 559 U.S. 133 (2010), this Court had interpreted the "physical force" element in Section 924(e)(2)(B)(i) to require "'*violent* force . . . capable of causing physical pain or injury to another person' and 'strong physical force.'" Pet. App. 8a-9a (quoting *Johnson*, 559 U.S. at 140). The court then concluded that "the degree of force *Johnson* requires for a conviction under [Section] 924(e)(2)(B)(i) is [also] required of a misdemeanor crime of domestic violence." *Id.* at 9a-10a.

In so holding, the court of appeals rejected the government's argument that *Johnson* did not control. Pet. App. 12a-13a & n.3. The court recognized that, in *Johnson*, this Court had emphasized the operative phrase "violent felony," whereas Section 921(a)(33)(A) defines a "misdemeanor crime of domestic violence." *Id.* at 13a n.3. But the court understood "the relevant portion of *Johnson* [to] suggest[] that the misdemeanor-felony distinction is not a viable framework for determining the level of violence an offense must require to qualify as a violent felony." *Id.* at 14a. The court therefore concluded that the phrase "'[m]isdemeanor crime of domestic violence' is most naturally interpreted to mean any crime requiring strong and violent physical force, which happens to be a misdemeanor." *Id.* at 12a.

The court of appeals next considered whether respondent's Tennessee domestic assault conviction categorically qualifies as a "misdemeanor crime of domestic violence," so defined. Pet. App. 15a-17a. The court concluded that violation of a statute that makes it a crime to cause "bodily injury" "does not require the use of violent force"—but for reasons different than the district court. *Id.* at 16a. The Sixth Circuit had previously held that aggravated assault by causing "serious physical harm" "necessarily requires proof that the defendant used 'force capable of causing physical pain or injury.'" *United States* v. *Anderson*, 695 F.3d 390, 400 (2012) (citation omitted). The court reasoned that the Tennessee domestic assault statute, which only required "bodily injury," was distinguishable because respondent "could have caused a slight, nonserious physical injury with conduct that cannot be described as violent," such as "a paper cut or a stubbed toe." Pet. App. 16a-17a. Accordingly, the court concluded that respondent's conviction did not qualify as a misdemeanor crime of domestic violence and that the district court had correctly dismissed the Section 922(g)(9) counts of the indictment.[4]

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[4] The court of appeals also concluded that respondent's conviction did not qualify as a misdemeanor crime of domestic violence under a modified categorical approach. Pet. App. 18a-20a. Though the court acknowledged that respondent's state indictment charged him with "intentionally or knowingly" causing bodily injury, the indictment did "not specify the type or severity of injury he caused." *Id.* at 18a.

b. Judge Moore concurred in a separate opinion. Pet. App. 21a-23a. She agreed that "the force requirement for a misdemeanor crime of domestic violence is identical to that specified under * * * the ACCA." *Id.* at 21a. Under *Johnson*, she explained, "it is not enough to look only at the *result* of the defendant's conduct; instead, the focus must be on the nature of the force proscribed by the statute and whether the *conduct itself* necessarily involves violent force." *Id.* at 22a. Because the Tennessee statute also "criminalizes reckless conduct," Judge Moore applied a modified categorical approach, concluding that respondent's conviction does not fall "within the confines of a misdemeanor crime of domestic violence." *Id.* at 21a, 23a.[5]

c. Judge McKeague dissented. Pet. App. 23a-33a. He argued that the majority erroneously applied *Johnson*'s "violent felony" standard to a "misdemeanor crime of domestic violence." *Id.* at 24a-26a. *Johnson*, he explained, "rejected the argument that the misdemeanor standard should control the felony definition" and, for the same reason, "the felony standard should not control the misdemeanor." *Id.* at 26a. Judge McKeague also concluded that respondent's conviction qualifies as a misdemeanor crime of domestic violence even under "the heightened *Johnson* standard," because "violent physical force is a necessary element to intentionally or knowingly inflicting bodily injury." *Id.* at 27a. He explained that the majority's holding to the contrary "has the effect of making the 'misdemeanor crime of domestic violence' provision * * * a dead letter in Tennessee, as well as any other state using the Model Penal Code's definition of assault to punish domestic abusers." *Id.* at 31a.

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[5] As Judge Moore noted, Tenn. Code Ann. § 39-13-101(a)(1) also punishes any individual who "recklessly" causes bodily injury to another. Because respondent was specifically charged with and convicted of the intentional or knowing causation of bodily injury (see J.A. 27-29), the question whether "reckless" conduct is included within the definition of a "misdemeanor crime of domestic violence" is not presented. See Pet. App. 18a; *id.* at 21a (Moore, J., concurring).

SUMMARY OF ARGUMENT

Respondent's misdemeanor domestic assault conviction for intentionally or knowingly causing bodily injury to the mother of his child is a "misdemeanor crime of domestic violence" within the meaning of Section 922(g)(9) and thereby disables him from possessing a firearm.

A. The definition of the phrase "misdemeanor crime of domestic violence" requires a prior conviction to have, as an element, the use (or attempted use) of physical force. But that force need not be "violent" in nature. In the context of common-law battery, the word "force" was understood to require only the slightest offensive touching. The presumption that Congress intends common-law terms of art to bear their common-law meaning directly applies here. And the statutory context only serves to confirm that common-law meaning.

The Court in *Johnson* v. *United States*, 559 U.S. 133, 140, 143-144 (2010), defined the term "violent *felony*" to require violent force for purposes of the ACCA, but it expressly left open the question whether "the phrase ['physical force'] has the same meaning in the context of defining a *misdemeanor* crime of domestic violence" under Section 922(g)(9). It does not.

The statutory term being defined is categorically different. There is nothing "peculiar" about defining a "misdemeanor crime of domestic violence" in light of the common-law definition of misdemeanor battery. *Id.* at 141. It is a natural fit. The broader statutory context, moreover, makes it both unnecessary and inappropriate to import the more restrictive "violent" physical force definition from the ACCA into Section 922(g)(9).

B. Even if "violent" physical force is required for an offense to qualify as a "misdemeanor crime of domestic violence," the intentional causation of bodily injury does have, as an element, the use of "violent" force. The court of appeals held otherwise because, in its view, a victim could have simply "stubbed [her] toe." Pet. App. 17a. That decision cannot be squared with the definition of "physical force" adopted in *Johnson*, which requires only that degree of force "capable" of causing "physical pain or injury." 559 U.S. at 140. Force that actually and intentionally *causes* bodily injury is, by definition, "capable" of causing "physical pain or injury." In any event, this Court has refused to rely on "legal imagination" to determine whether a prior conviction qualifies as a predicate offense under federal law. *Gonzales* v. *Duenas-Alvarez*, 549 U.S. 183, 193 (2007). The court of appeals' fanciful hypotheticals cannot take respondent's conviction for causing bodily injury outside the reach of Section 922(g)(9).

C. The Sixth Circuit agreed that intentionally causing bodily injury requires the use of some force, but the district court denied even that common-sense proposition. In its view, no use of force is needed to intentionally cause bodily injury since the victim could have been poisoned or otherwise tricked or coerced into injuring herself. That is incorrect. The common-law meaning of "force" was not limited to direct physical contact; it included more subtle or indirect uses of force such as poisoning. The district court's reasoning is also flawed because it too rests on hypotheticals—and produces statutory anomalies. Intentional offensive touching plainly involves the use of force (albeit not "violent" force). And any rule that includes intentional offensive touching as a "misdemeanor crime of domestic violence," but excludes the greater offense (*i.e.*, intentionally causing bodily injury) cannot be correct.

D. The decisions below, if applied nationwide, would render Section 922(g)(9) a virtual "dead letter" in all but (at most) a handful of States "from the very moment of its enactment." *United States* v. *Hayes*, 555 U.S. 415, 427 (2009) (internal quotation marks omitted). Most domestic abusers are prosecuted under generic assault and battery laws or (in the States that have them) domestic assault and battery laws. All but a few of the state misdemeanor assault and battery laws punish either intentional offensive touching, the intentional causation of bodily injury, or both. See App. B-D, *infra*, 10a-29a. Under the decisions below, *none* of those statutes would give rise to a qualifying conviction under Section 922(g)(9). Such a drastic curtailment of the statute's scope contravenes Congress's intent to close what it viewed as a "dangerous loophole" and to "keep[] firearms out of the hands of domestic abusers." *Hayes*, 555 U.S. at 426 (citation omitted).

E. The statutory history confirms Congress's understanding that domestic abusers were often convicted of misdemeanor assault and battery offenses, and its intent that such convictions qualify as "misdemeanor crime[s] of domestic violence." And while it is true that Congress was concerned with violent conduct and serious domestic abuse, the decisions below thwart that very purpose by allowing indisputably violent offenders who are convicted of misdemeanor assault and battery offenses to arm themselves with a gun.

ARGUMENT

RESPONDENT'S MISDEMEANOR DOMESTIC ASSAULT CONVICTION QUALIFIES AS A "MISDEMEANOR CRIME OF DOMESTIC VIOLENCE"

The Sixth Circuit held that respondent's conviction for misdemeanor domestic assault under Tennessee law for intentionally or knowingly causing bodily injury to the mother of his child did not qualify as a "misdemeanor crime of domestic violence" under 18 U.S.C. 922(g)(9). The court of appeals erred at both steps of its analysis. "Violent" physical force is not required for a conviction to qualify as a "misdemeanor crime of domestic violence" under Section 922(g)(9). And, even if "violent" physical force were required, domestic assault by intentionally causing bodily injury has, as an element, the use of such "violent" force. The district court's more expansive reasoning (*i.e.*, that intentionally causing bodily injury does not require the use of *any* force) was rejected by the Sixth Circuit—and for good reason. Inherent in a person's causing bodily injury (as opposed to emotional or psychological injury) is the use of physical force to accomplish that end.

The reasoning of the decisions below should be rejected because, if applied nationwide, it would render Section 922(g)(9) a practical nullity in nearly every

State. And it would frustrate Congress's clear intent to "keep[] firearms out of the hands of domestic abusers." *United States* v. *Hayes*, 555 U.S. 415, 426 (2009).

A. Section 921(a)(33)(A) Does Not Require "Violent" Physical Force For A Crime To Qualify As A "Misdemeanor Crime Of Domestic Violence"

Federal law makes it a crime for a person convicted of a "misdemeanor crime of domestic violence" to possess a firearm. 18 U.S.C. 922(g)(9). A "misdemeanor crime of domestic violence" is defined as a misdemeanor that "has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon." 18 U.S.C. 921(a)(33)(A). In *Johnson* v. *United States*, 559 U.S. 133, 139 (2010), this Court interpreted "physical force" to require "violent" force in the context of defining a "violent felony" under the ACCA, which triggers a mandatory minimum of 15 years in prison. See 18 U.S.C. 924(e)(1) and (2)(B)(i). This Court should not apply *Johnson*'s interpretation of "physical force" in the "violent felony" context of the ACCA to the very different "misdemeanor crime of domestic violence" context of Section 922(g)(9).

1. Section 921(a)(33)(A) does not define "physical force." In *Johnson*, the Court considered the meaning of "physical force" as used in the definition of the term "violent felony" in the ACCA. 559 U.S. at 138-143. The Court explained that the "adjective 'physical'" "plainly refers to force exerted by and through concrete bodies—distinguishing physical force from, for example, intellectual or emotional force." *Id.* at 138. As for the noun "force," the Court acknowledged that it has "a number of meanings," but it focused on two in particular. *Ibid.*; see *id.* at 146 (Alito, J., dissenting). The first, "more general usage," suggests "a

degree of power that would not be satisfied by the merest touching." *Id.* at 139; see Black's Law Dictionary 717 (9th ed. 2009) (Black's) (defining "force" as "[p]ower, violence, or pressure directed at a person or thing"); *ibid.* (defining "physical force" as "[f]orce consisting in a physical act, esp. a violent act directed at a robbery victim"). So understood, "force" requires "*violent* force," *i.e.*, "force capable of causing physical pain or injury to another person." *Johnson*, 559 U.S. at 139, 140.

The second, "more specialized legal usage," comes from common-law battery. *Johnson*, 559 U.S. at 139. At common law, battery covered the "application of unlawful *force* against the person of another." *Ibid.* (emphasis added); see 2 Wayne R. LaFave, *Substantive Criminal Law* § 16.2, at 552 (2d ed. 2003) (LaFave); Model Penal Code § 211.1, cmt. 1(a), at 175 (1980); Rollin M. Perkins, *Non-Homicide Offenses Against the Person*, 26 B.U. L. Rev. 119, 120 (1946) (Perkins); Black's 173. The word "force" was understood to include "even the slightest offensive touching." *Johnson*, 559 U.S. at 139; see *id.* at 146 (Alito, J., dissenting) (noting that the "well-established meaning" of the word "force" at "common law" included "even the 'slightest offensive touching'") (citation omitted); Model Penal Code § 211.1, cmt. 1(a), at 175 (At common law, "the notion of force was not limited to actual violence but included any kind of offensive and unlawful contact."); Perkins 120 ("'[V]iolence' and 'force' are synonyms" in this context and "include any application of force."). The common-law approach reflected a judgment that "the law cannot draw the line between different degrees of violence, and therefore totally prohibits the first and lowest stage of it."

3 William Blackstone, Commentaries *120 (1768) (Blackstone) (discussing battery as a private wrong); see 4 Blackstone *216-*218 (noting that battery is also a public wrong, and referring to prior discussion of battery as a private wrong). Accordingly, the common-law meaning of "force" does not require any particular degree or quantum of violence.[6]

Where (as here) there are two possible ways to define the word "force," the Court generally adopts the accepted common-law meaning. "It is a settled principle of interpretation that, absent other indication, Congress intends to incorporate the well-settled meaning of the common-law terms it uses." *Sekhar* v. *United States*, 133 S. Ct. 2720, 2724 (2013) (internal quotation marks and citation omitted); *Microsoft Corp.* v. *i4i Ltd. P'ship*, 131 S. Ct. 2238, 2245, 2246 (2011); *Morissette* v. *United States*, 342 U.S. 246, 263 (1952). And, in *Johnson*, the Court recognized that "a common-law term of art should be given its established common-law meaning." 559 U.S. at 139 (citing *United States* v. *Turley*, 352 U.S. 407, 411 (1957)).

That general rule, however, is subject to exceptions. The Court will not "assume that a statutory word is used as a term of art where that meaning does not fit." *Johnson*, 559 U.S. at 139. And the Court in *Johnson* concluded that the common-law meaning of

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[6] Not all subjectively unwanted physical contact, however, qualifies as battery under the common-law approach. The law recognizes that, "in a crowded world, a certain amount of personal contact is inevitable, and must be accepted." W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 9, at 42 (5th ed. 1984). To qualify as a battery, the contact must be objectively offensive and "unwarranted by the social usages prevalent at the time and place at which it is inflicted." 1 Restatement (Second) of Torts § 19 cmt. a, at 35 (1965).

"force" "d[id] not fit" in the context of the ACCA's definition of "violent felony." *Id.* at 139-142. Rather, in the Court's view, it was "a comical misfit with the defined term 'violent felony.'" *Id.* at 145. The Court explained that the word "violent," especially when "attached to the noun 'felony,'" connotes "strong physical force." *Id.* at 140-141. And the Court found it "significant" that battery was a crime punishable as a misdemeanor at common law and generally punishable as a misdemeanor today. *Id.* at 141. The Court thought it "unlikely that Congress would select as a term of art defining 'violent felony' a phrase that the common law gave peculiar meaning only in its definition of a misdemeanor." *Ibid.*

2. *Johnson* expressly reserved the question whether the phrase "physical force" has the same meaning in the context of Section 922(g)(9)'s definition of "misdemeanor crime of domestic violence." 559 U.S. at 143-144. The Court explained that it had "interpreted the phrase 'physical force' only in the context of a statutory definition of 'violent felony,'" and that it was not deciding whether "the phrase has the same meaning in the context of defining a *misdemeanor* crime of domestic violence." *Ibid.* This case presents the question left open in *Johnson* and the answer is: it does not.

a. Respondent relies on "the normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning." Br. in Opp. 9 (quoting *Brooke Grp. Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 230 (1993)). As this Court has repeatedly emphasized, however, that "rule" is neither "rigid" nor "absolute." *Barber* v. *Thomas*, 130 S. Ct. 2499, 2506

(2010); *Atlantic Cleaners & Dyers, Inc.* v. *United States*, 286 U.S. 427, 433 (1932) (*Atlantic Cleaners*). "[M]ost words have different shades of meaning and consequently may be variously construed, not only when they occur in different statutes, but when used more than once in the same statute or even the same section." *Environmental Def.* v. *Duke Energy Corp.*, 549 U.S. 561, 574 (2007) (quoting *Atlantic Cleaners*, 286 U.S. at 433). Any presumption thus "readily yields whenever there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent." *Roberts* v. *Sea-Land Servs., Inc.*, 132 S. Ct. 1350, 1360 (2012) (quoting *General Dynamics Land Sys., Inc.* v. *Cline*, 540 U.S. 581, 595 (2004)); see *Atlantic Cleaners*, 286 U.S. at 433 (meaning of the same words "well may vary to meet the purposes of the law"). As the Court expressly contemplated in *Johnson*, 559 U.S. at 143-144, the phrase "physical force" does not have the same meaning in the statutory context of a "misdemeanor crime of domestic violence" under Section 922(g)(9) as it does in the statutory context of a "violent felony" under the ACCA. Here, the accepted common-law meaning "fit[s]." *Id.* at 139.

b. In *Johnson*, the Court's reasoning rested primarily on the term being defined: "violent felony." See 559 U.S. at 140 ("interpreting the phrase 'physical force' as used in * * * the statutory category of 'violent felon[ies]'") (brackets in original); *ibid.* (referring to "the context of a statutory definition of 'violent felony'") (emphasis omitted); *id.* at 141 (declining to "import" such meaning into "this definition of 'violent felony'"); *ibid.* (noting that "physical force" is being used to "defin[e] 'violent felony'"); *id.* at 142 (noting that the phrase "physical force" is "contained in a definition of 'violent felony'"); *id.* at 143 (interpreting the phrase "[i]n the context of a statutory definition of 'violent felony'"); *id.* at 145 (focusing on "the defined term 'violent felony'"). The statutory term being defined here differs categorically. There is nothing "peculiar" about defining "misdemeanor crime of domestic violence" in light of the common-law definition of misdemeanor battery. To the contrary, it is a natural fit.

Section 922(g)(9) is directed exclusively at misdemeanors, not felonies. The Court in *Johnson* found it "significant" that at common law—and even today—battery was generally punishable as a misdemeanor. 559 U.S. at 141. And the Court declined to "import" a "meaning of 'physical force'" "derived from a common-law *misdemeanor*" into the "definition of 'violent *felony*.'" *Ibid.* (second emphasis added); see *ibid.* (finding it "unlikely that Congress would select as a term of art defining 'violent felony' a phrase that the common law gave peculiar meaning only in its definition of a misdemeanor"). Although the Court in *Johnson* thought it unreasonable to read "force" as having its common-law meaning in the context of the ACCA's definition of "violent *felony*," nothing is incongruous about that reading in the context of Section 922(g)(9)'s definition of "*misdemeanor* crime of domestic violence." The "specialized legal usage" of "force" from common-law misdemeanor battery comfortably "fit[s]" when defining the term "misdemeanor crime of domestic violence." *Id.* at 139, 140, 143-144.

"Misdemeanor crime of domestic violence" also does not have the same "connotation" of "strong physical force" as "violent felony." See *Johnson*, 559 U.S. at 140. The Court found that connotation especially clear in *Johnson* because the "adjective 'violent'" was "attached to the noun 'felony.'" *Ibid.* That is not true here. The noun "violence" is modified by the adjective "domestic" and further limited by "misdemeanor." 18 U.S.C. 921(a)(33)(A). "Domestic violence" is also synonymous with "domestic abuse." Black's 1705-1706; see *id.* at 10 (defining "abuse" as "[p]hysical or mental maltreatment, often resulting in mental, emotional, sexual, or physical injury"). Indeed, the legislative record refers to "domestic abuse" (including "child abuse" and "spousal abuse") interchangeably with "domestic violence." See, *e.g.*, 142 Cong. Rec. 21,438 (1996) (statement of Sen. Lautenberg), 22,986 (statements of Sens. Lautenberg & Wellstone), 25,001-25,002, 26,674 (statements of Sen. Lautenberg). Congress could have just as easily chosen to prohibit the possession of firearms by those convicted of "misdemeanor crime[s] of domestic abuse." See, *e.g.*, Iowa Code Ann. § 708.2A (West 1995) ("domestic abuse assault"); Okla. Stat. Ann. tit. 21, § 644(C) (West 1996) ("domestic abuse"); Haw. Rev. Stat. § 709-906 (1995) ("abuse of family or household members"). Placing undue emphasis on the word "violence" in isolation ignores that larger statutory context.[7]

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[7] The victims of domestic violence or domestic abuse, moreover, are often referred to as "battered" women or children. Black's 172 (defining a "battered woman" as a "woman who is the victim of domestic violence; a woman who has suffered physical, emotional, or sexual abuse at the hands of a spouse or partner"). And, of

c. Other differences between the broader statutory contexts make it both unnecessary and inappropriate to import the violent "physical force" definition from the ACCA into Section 922(g)(9). The ACCA is a recidivist sentencing enhancement targeted at a subset of Section 922(g) offenders with relatively serious and significant criminal histories. Section 922(g) offenders generally are subject to a maximum term of ten years in prison, 18 U.S.C. 924(a)(2); but if an offender has a predicate offense that qualifies as a "violent felony," and two other qualifying predicate offenses, he is subject to a minimum prison term of 15 years, 18 U.S.C. 924(e)(1). In that context, requiring "violent" force ensures that the enhanced punishment is reserved for "armed career criminal" recidivists. See *Begay* v. *United States*, 553 U.S. 137, 146 (2008) (declining to adopt an interpretation that would apply the "15-year mandatory minimum sentence" to "a host of crimes which, though dangerous, are not typically committed by those whom one normally labels 'armed career criminals'").

Section 922(g)(9) is different in kind and in degree. It prohibits a class of persons thought to pose a heightened risk of danger (those with convictions for misdemeanor crimes of domestic violence) from possessing a firearm. Section 922(g) disables several other classes from possessing firearms as well, including convicted felons, fugitives from justice, addicts and unlawful users of controlled substances, persons adjudicated mentally defective or committed to a mental institution, illegal aliens and certain aliens admitted on non-immigrant visas, dishonorably

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course, "battered" is a derivative of "battery," which lends further support to the common-law battery understanding of "force."

discharged servicemen, persons who have renounced their U.S. citizenship, and persons subject to domestic-violence restraining orders. See 18 U.S.C. 922(g)(1)-(8); see also 18 U.S.C. 922(d) (making it unlawful to sell or transfer firearms to prohibited persons). The purpose of the firearms disability provisions is to "keep guns out of the hands" of "potentially irresponsible and dangerous" persons who "may not be trusted to possess a firearm without becoming a threat to society." *Dickerson* v. *New Banner Inst., Inc.*, 460 U.S. 103, 112 (1983) (internal quotation marks and citation omitted); *Barrett* v. *United States*, 423 U.S. 212, 218 (1976). A narrow definition of "physical force" targeted to enhance the punishment of only the most violent criminals is out of place in a statute designed to prevent harms by restricting a wider group of untrustworthy persons from possessing firearms.

The adverse practical consequences of adopting a restrictive definition of "physical force" are also considerably more substantial in the context of Section 922(g)(9) than they were in *Johnson*. After *Johnson*, a felony battery offense that reaches intentional offensive touching cannot categorically qualify as a "violent felony" under Section 924(e)(2)(B)(i) and the defendant may not be eligible for the 15-year mandatory minimum sentence under the ACCA. But he is still prohibited from possessing a gun. See 18 U.S.C. 922(g)(1).

The Court's holding in *Johnson* is also unlikely to substantially limit the scope of the ACCA. As this Court recognized, "simple battery" is "generally" punishable as a misdemeanor, not a felony, and thus would often fail to qualify as a predicate offense under the ACCA for other reasons. 559 U.S. at 141; cf. *id.* at 136 (noting that the Florida battery offense is "ordinarily" a misdemeanor, but was a felony because the defendant was a recidivist); *id.* at 150 & n.4 (Alito, J., dissenting) (listing victim-specific felony battery or sexual battery statutes). And a non-qualifying battery offense may still constitute a "violent felony" under the "residual clause" for crimes that "otherwise involve[] conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. 924(e)(2)(B)(ii); cf. *Johnson*, 559 U.S. at 145 (noting that the government had waived that issue and declining to decide it).

In contrast, a holding that common-law misdemeanor battery does not constitute a "misdemeanor crime of domestic violence" will drastically impair the scope and effectiveness of Section 922(g)(9). If an offender previously convicted of a misdemeanor common-law battery offense against a family member is not subject to Section 922(g)(9), he generally will *not* be prohibited from possessing a firearm. And, unlike the ACCA, Section 922(g)(9) is limited to misdemeanor offenses like common-law battery. No "residual clause" could otherwise capture non-qualifying convictions. And common-law battery convictions represent a significant portion of the domestic-violence offenses that would otherwise qualify as "misdemeanor crime[s] of domestic violence." See Part D, *infra*. A reading of "physical force" that would eviscerate the statute's core purpose cannot be reconciled with Congress's intent.

B. Even If "Violent" Physical Force Is Required, An Assault That Intentionally Results In Bodily Injury Necessarily Has, As An Element, The Use Of "Violent" Force

Even if "violent" physical force is required for an offense to qualify as a "misdemeanor crime of domestic violence" under Section 922(g)(9), respondent's conviction for intentionally or knowingly causing bodily injury to a family member has, as an element, the use of "violent" force. The court of appeals held otherwise because, in its view, respondent could have been convicted under the Tennessee statute for causing "a slight, nonserious physical injury with conduct that cannot be described as violent," such as "a paper cut or a stubbed toe." Pet. App. 16a-17a. The court's reasoning does not withstand scrutiny.

1. In *Johnson*, the Court defined "violent" force as "force capable of causing physical pain or injury to another person." 559 U.S. at 140. The Court did not require a degree of force capable of causing "serious" physical pain or "serious" injury to another person. It required only force "capable" of causing some "physical pain or injury." As the Court explained, the spectrum of "physical force" ranges from the "merest touch" to force that "rise[s] to the level of bodily injury." *Id.* at 143 (quoting 18 U.S.C. 922(g)(8)(C)(ii)). Interpreting "physical force" in the ACCA to exclude the "merest touch" does not mean that force "ris[ing] to the level of bodily injury" is required. *Ibid.* The Court ultimately adopted a meaning of "physical force" falling somewhere between the "merest touch"

and "bodily injury," *i.e.*, "that degree of force necessary to inflict pain." *Ibid.*[8]

That definition plainly encompasses the intentional causation of bodily injury. Force that is merely "capable" of causing physical pain or injury is, by definition, a lesser quantum of force than what is needed to *actually* cause bodily injury. See *De Leon Castellanos* v. *Holder*, 652 F.3d 762, 766 (7th Cir. 2011). A defendant can intentionally *cause* bodily injury only by knowingly using force capable of causing physical pain or injury. That is all *Johnson* requires. Respondent's domestic assault conviction for intentionally causing bodily injury therefore qualifies as a "misdemeanor crime of domestic violence"—even if "violent" force

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[8] The Court's discussion of the different degrees of force occurred in the context of distinguishing the language in Section 922(g)(8)(C)(ii), which requires a qualifying court order to, *inter alia*, "prohibit[] the use, attempted use, or threatened use of physical force against [an] intimate partner or child *that would reasonably be expected to cause bodily injury.*" 18 U.S.C. 922(g)(8)(C)(ii) (emphasis added). That distinction bears even more weight in this context. Section 922(g)(8) immediately precedes Section 922(g)(9); the two subsections are aimed at a similar subject matter (namely, keeping guns away from abusive or potentially abusive family members); and they were adopted two years apart. Compare Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 110401(c)(3), 108 Stat. 2014, with 1997 Appropriations Act § 658(b), 110 Stat. 3009-372. Yet, Section 922(g)(9) does not require a use of force "that would reasonably be expected to cause bodily injury." Compare 18 U.S.C. 922(g)(8)(C)(ii), with 18 U.S.C. 921(a)(33)(A)(ii). It logically follows that when the degree of force used *does* inflict bodily injury, it necessarily is sufficient for purposes of Section 922(g)(9).

(*i.e.*, something more than the "merest touch") is required.[9]

2. The court of appeals' reliance on fanciful hypotheticals (such as a "paper cut" or "stubbed toe" (Pet. App. 17a)) is also insufficient to take respondent's conviction outside the reach of Section 922(g)(9). In *Gonzales* v. *Duenas-Alvarez*, 549 U.S. 183 (2007), this Court made clear that "to find that a state statute creates a crime outside the generic definition of a listed crime in a federal statute requires more than the application of legal imagination to a state statute's language"; it requires a "realistic probability," and not just a "theoretical possibility," that the state statute would be applied in a "nongeneric" way. *Id.* at 193; see *Moncrieffe* v. *Holder*, 133 S. Ct. 1678, 1684-1685 (2013) (explaining that the "focus on the minimum

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[9] Although the Court in *Johnson* did not decide that issue, it plainly assumed that the intentional causation of bodily injury has, as an element, the use of such "violent" force. Battery under the Florida statute at issue in *Johnson* could have been committed in "one of three ways": (i) by "[i]ntentionally caus[ing] bodily harm"; (ii) by "intentionally str[iking] the victim"; or (iii) by "[a]ctually and intentionally touch[ing] the victim." 559 U.S. at 136-137 (first, fourth & fifth sets of brackets in original). Because the record provided no basis to conclude that the defendant's conviction had "rested upon anything more than the *least* of these acts," the Court focused on whether "[a]ctually and intentionally touch[ing]" another person involves the "use of physical force." *Ibid.* (emphasis added; brackets in original; internal quotation marks omitted). That the greater offense (*i.e.*, intentionally causing bodily harm) would have qualified as a "violent felony" is implicit in the Court's reasoning. *Id.* at 136-137, 144-145; see *id.* at 151 & n.3 (Alito, J., dissenting) (citing, as state statutes that "reach both the use of violent force and force that is not violent but is unlawful and offensive," statutes that include assault and battery by causing bodily injury); cf. App. B, *infra*, 10a-16a.

conduct criminalized by the state statute is not an invitation to apply 'legal imagination' to the state offense"). To establish the requisite probability, the Court instructed that an offender "must at least point to his own case or other cases in which the state courts in fact did apply the statute in the special (nongeneric) manner for which he argues." *Duenas-Alvarez*, 549 U.S. at 193; see *Moncrieffe*, 133 S. Ct. at 1693 (rejecting the government's reliance on an "antique firearm" exception because, "[t]o defeat the categorical comparison," the defendant "would have to demonstrate that the State actually prosecutes the relevant offense in cases involving antique firearms").

The same reasoning applies here. Respondent has suggested that *Duenas-Alvarez* applies only in determining whether a state crime counts as an enumerated offense under federal law (for example, "theft" or "burglary"), not in determining whether a state crime has "as an element" the use of physical force as required by the federal definition. See Br. in Opp. 19-20. But no sound reason justifies declining to apply *Duenas-Alvarez*'s analysis to the "elements" clause. The starting point for each clause is to identify the elements of the prior offense.

As the Court explained in *Taylor* v. *United States*, a state crime counts as an enumerated offense if it has "all the *elements* of" the enumerated crime's generic definition. 495 U.S. 575, 599 (1990) (emphasis added); *id.* at 598 (identifying the elements of generic "burglary" for purposes of the ACCA, 18 U.S.C. 924(e)(2)(B)(ii)); *Duenas-Alvarez*, 549 U.S. at 186-187 (discussing *Taylor*). Indeed, the Court in *Taylor* relied in part on the "as an element" language in Section 924(e)(2)(B)(i) to conclude that Congress *also* intended to focus on the "elements of the statute of conviction" for the crimes enumerated in Section 924(e)(2)(B)(ii). 495 U.S. at 600-601. And, just last Term, the Court again emphasized that the "central feature" of the "categorical approach" is a "focus on the elements" and that courts must "compare the elements of the crime of conviction * * * with the elements of the generic crime." *Descamps* v. *United States*, 133 S. Ct. 2276, 2281, 2285 (2013); see *id.* at 2281 (prior conviction qualifies as an enumerated offense and, thus, a "violent felony" under Section 924(e)(2)(B)(ii), "only if the statute's elements are the same as, or narrower than, those of the generic offense.").

That Section 921(a)(33)(A)(ii) requires the state-law predicate offense have a use-of-force *element*, therefore, does not distinguish this case from the "elements-centric" approach in *Duenas-Alvarez*. See *Descamps*, 133 S. Ct. at 2287. Here, the court of appeals identified no evidence that anyone has been prosecuted under Tenn. Code Ann. § 39-13-101(a)(1) for causing a paper cut or a stubbed toe. And respondent does not suggest that his conviction rested on such a slight injury. That is not surprising. Criminal prosecutions are not costless and minor slights (like a paper cut) are unlikely to give rise to criminal convictions. See *Flores* v. *Ashcroft*, 350 F.3d 666, 670 (7th Cir. 2003) (The defendant "did not tickle his wife with a feather during a domestic quarrel * * * . That would not have led to a prosecution."); *id.* at 672 (Evans, J., concurring) ("[P]eople don't get charged criminally for expending a newton of force against victims."); *United States* v. *Hays*, 526 F.3d 674, 683 n.3 (10th Cir. 2008) (Ebel, J., dissenting) (noting that "only incidents that were sufficiently severe to require police intervention and ultimately support a criminal conviction" will lead to prosecution under Section 922(g)(9)).

C. The District Court's More Expansive Holding That The Intentional Causation Of Bodily Injury Does Not Require *Any* Use Of Force Was Correctly Rejected By The Sixth Circuit

The Sixth Circuit agreed that the intentional causation of bodily injury requires the use of some force. See *United States* v. *Anderson*, 695 F.3d 390, 400-401 & n.4 (2012). Because "violent" force is not required (see Part A, *supra*), and because, even if it were, intentionally causing bodily injury satisfies that test (see Part B, *supra*), that should be the end of the matter.

The district court, however, adopted a more expansive reason to dismiss the Section 922(g)(9) counts in this case. In its view, a statute prohibiting the intentional causation of bodily injury does not have, as an element, the use of *any* physical force (violent or otherwise) because it "may be violated through coercion or deception rather than through" direct physical contact with the victim. Pet. App. 40a. For example, the district court explained, a person could "cause a victim to suffer bodily injury by deceiving him into drinking a poisoned beverage, without making contact of any kind," or by "coerc[ing] the victim into taking the drink." *Id.* at 41a; see *United States* v. *Hagen*, 349 Fed. Appx. 896 (5th Cir. 2009) (per curiam), cert.

denied, 131 S. Ct. 457 (2010).[10] That reasoning is flawed three times over.

1. First, it assumes that the intentional causation of bodily injury through poisoning, deceit, or other subtle or indirect means does not entail the use of "force."[11] That is incorrect. In the context of common-law battery, the word "force" was not limited to making direct physical contact with the victim. See LaFave § 16.2(b), at 554 ("The force used need not be applied directly to the body of the victim," such as the "usual case where one shoots at another or strikes him with a knife, club or fist."). It included "indirect[]" applications of force by the "aggressor himself" or "by

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[10] Several courts of appeals have held likewise in the context of other statutes that require a use-of-force element. See, *e.g.*, *United States* v. *Villegas-Hernandez*, 468 F.3d 874, 878-883 (5th Cir. 2006) ("crime of violence" definition under 18 U.S.C. 16(a)), cert. denied, 549 U.S. 1245 (2007); *United States* v. *Perez-Vargas*, 414 F.3d 1282, 1285-1287 (10th Cir. 2005) ("crime of violence" definition under Sentencing Guidelines § 2L.12, comment. (n.1(B)(iii))); *Chrzanoski* v. *Ashcroft*, 327 F.3d 188, 194-196 (2d Cir. 2003) ("crime of violence" definition under 18 U.S.C. 16(a)).

[11] In the context of a Sentencing Guidelines provision, the Tenth Circuit concluded that drugging a victim does not involve the use of "physical" force. See *United States* v. *Rodriguez-Enriquez*, 518 F.3d 1191, 1194 (10th Cir. 2008). Although the court acknowledged the possibility "that the adjective *physical* before the word *force* is being used to distinguish the described force from a force generated by emotion, psychology, religion, or rhetoric," it opted for a definition of "physical" that requires a "mechanical impact." *Ibid.* ("[I]t is the presence of [a] mechanical impact that defines when force is physical. In contrast, the effect of poison on the body is achieved by chemical action, not mechanical impact."). In *Johnson*, this Court disagreed, holding that "[t]he adjective physical * * * plainly refers to force exerted by and through concrete bodies—distinguishing physical force from, for example, intellectual force or emotional force." 559 U.S. at 138.

some substance which he puts into motion." *Ibid.*; Perkins 122; see Model Penal Code § 211.1, cmt. 1(a), at 175 ("The requirement of force could be satisfied directly, as by a blow of the fist, or indirectly, as by the use of a mechanical agent."); see also *Lynch* v. *Commonwealth*, 109 S.E. 427, 428 (Va. 1921).

The requisite "force" could therefore be satisfied by "administering a poison," "by infecting [a victim] with a disease," or by "threatening sudden violence and thereby causing another to jump from a window" or from "a moving vehicle." Perkins 122; LaFave § 16.2(b), at 554-555; see *Smith* v. *Smith*, 9 S.E.2d 584, 589-590 (S.C. 1940) ("While the word 'force' suggests to the mind a physical power, nevertheless, in the case of battery, deception may be the equivalent of force."); *Carr* v. *State*, 34 N.E. 533, 534 (Ind. 1893) ("If that which causes the injury is set in motion by the wrongful act of the defendant, it cannot be material whether it acts upon the person injured externally or internally, by mechanical or chemical force.") (citation omitted).[12]

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[12] See also, *e.g.*, *State* v. *Monroe*, 28 S.E. 547, 548 (N.C. 1897) (druggist who sold candy laced with sufficient croton oil to cause injury, knowing that the candy would be administered to another as a trick, was guilty of assault); *Commonwealth* v. *Stratton*, 114 Mass. 303, 303-304 (1873) (defendant, who offered the victim figs that had been drugged without the victim's knowledge, was guilty of assault and battery); *State* v. *Snyder*, 172 P. 364, 364-365 (Nev. 1918) (defendant, who used "constructive force" to administer poison that rendered the victim unconscious for the purpose of taking his money, was guilty of robbery requiring the use of "force"); cf. *State* v. *Dawson*, 985 S.W.2d 941, 951-952 (Mo. App. 1999) (finding "physical contact" element of assault statute satisfied when defendant placed semen in the victim's coffee mug which she ingested).

The common-law understanding of the word "force" again fits comfortably within the "misdemeanor crime of domestic violence" definition. See Part A, *supra*. The statute speaks generally of the "use" or "attempted use" of "physical force." It does not require a "direct" use of physical force. Nor does it dictate that the "aggressor himself" actually apply physical force to the victim. Indeed, unlike the definition of "violent felony" in Section 924(e)(B)(2)(i), the "misdemeanor crime of domestic violence" definition does not even require the use of physical force "against the person of another." Compare 18 U.S.C. 924(e)(2)(B)(i), with 18 U.S.C. 921(a)(33)(A)(ii). Because "Congress intends to incorporate the well-settled meaning of the common-law terms it uses," *Sekhar*, 133 S. Ct. at 2724 (citation omitted), the common-law meaning of "force" should control here. Cf. *United States* v. *Evans*, 699 F.3d 858, 864 (6th Cir. 2012) ("A defendant uses physical force under [Sentencing Guidelines] § 4B1.2(a)(1)" whenever he "knowingly sets in motion a series of events that the defendant knows will result in the application of 'a force capable of causing physical pain or injury to another person.'") (quoting *Johnson*, 559 U.S. at 140).

Whether a person directly injects poison into the arm of his victim or instead poisons his victim's food, he has intentionally used the forceful physical properties of the poison to achieve his objective. As the Ninth Circuit explained in a case involving threatened anthrax poisoning, "the bacteria's physical effect on the body is no less violently forceful than the effect of a kick or blow." *United States* v. *De La Fuente*, 353 F.3d 766, 771 (2003). Similarly, by "luring [a] person to an ocean undertow or placing deadly poison in his drink," the defendant is using "physical force against that person"—whether in the form of "water suffocating lungs, or cyanide disrupting metabolism." *United States* v. *Calderon-Pena*, 383 F.3d 254, 271 (5th Cir. 2004) (en banc) (Smith, J., dissenting) (Those forces, "[h]owever remote, * * * were still directed to work according to his will, as surely as was a swung fist or a fired bullet."), cert. denied, 543 U.S. 1076 (2005). In sum, an intentional assault (or battery) requiring the actual bodily injury of the victim involves the use of "physical force," even if committed by subtle or indirect means.

2. Second, even if Section 921(a)(33)(A) were read to exclude any assault crime capable of commission by indirect or subtle uses of force (such as poisoning), that would not disqualify the Tennessee domestic assault statute as a "misdemeanor crime of domestic violence." As explained above, this Court has declined to rely on such "legal imagination" in applying the categorical approach. See *Duenas-Alvarez*, 549 U.S. at 193; *Moncrieffe*, 133 S. Ct. at 1684-1685. Respondent does not dispute that his domestic assault conviction involved direct physical contact with the mother of his child. And neither respondent nor the district court has pointed to other cases in which the state courts have applied Tennessee's misdemeanor domestic assault (or misdemeanor generic assault) statutes to, for example, a husband who poisoned his wife or a father who tricked his child into jumping out of her bedroom window. Purely hypothetical applications of the bodily-injury prong of Tennessee's domestic assault statute are insufficient to demonstrate that respondent's conviction does not qualify as a "misde-

meanor crime of domestic violence" under Section 922(g)(9).

3. Third, a contrary conclusion would create statutory anomalies. As an initial matter, it could lead to the differential treatment of two common ways of committing assault and battery: intentional offensive touching and intentionally causing bodily injury. If the Court agrees that "violent" physical force is not required in this context (see Part A, *supra*), offensive assault or battery by intentional touching would qualify as a "misdemeanor crime of domestic violence." But, under the district court's reasoning, assault or battery by intentionally causing bodily injury would *not*. That result cannot be reconciled with this Court's clear (and common sense) statement in *Johnson* that battery by offensive intentional touching is the "le[sser]" of the two offenses. 559 U.S. at 136-137; see note 9, *supra*.

Many States, moreover, define a range of crimes against a person, from simple assault to murder, by specifying a particular result (*e.g.*, the causation of "bodily injury" or "death"), without explicitly specifying the means by which an offender must have achieved that result. See, *e.g.*, Ala. Code § 13A-6-2(a)(1) (2013) ("A person commits the crime of murder if[,] * * * [w]ith intent to cause the death of another person, he or she causes the death of that person or of another person."); Alaska Stat. Ann. § 11.41.100(a)(1) (West 2013) (similar); Ariz. Rev. Stat. Ann. § 13-1105(A)(1) (2013) (similar); Colo. Rev. Stat. § 18-3-102(1)(a) (West 2013) (similar); Conn. Gen. Stat. Ann. § 53a-54a(a) (West 2013) (similar). Many such offenses can be committed by means of subtle or indirect uses of physical force, as well as by direct physical contact between the offender and the victim. See LaFave § 14.2(c), at 433 ("While the method of producing an intentional death is usually some weapon in the hands of the murderer, * * * sometimes more subtle means are used."). Yet, under the district court's reasoning (and that of other courts of appeals) even murder would not have, as an element, the use of physical force, since it can be accomplished through indirect means such as poisoning or deceit.

Congress could not have intended that result. Many federal provisions, like Section 921(a)(33)(A), define predicate acts to include offenses that have, as an element, the use of physical force. See, *e.g.*, 18 U.S.C. 16(a) (defining "crime of violence"); *Leocal* v. *Ashcroft*, 543 U.S. 1, 7 (2004) (noting that Section 16 has been "incorporated into a variety of statutory provisions, both criminal and noncriminal"); 18 U.S.C. 373(a), 521(c)(2), 924(c)(3)(A), 924(e)(2)(B)(i); cf. 20 U.S.C. 1161w(f)(3)(A)(ii) (Supp. V 2011); 28 U.S.C. 540A(c)(1). For example, under the district court's reasoning, someone who solicits another person to commit murder could not be charged with "[s]olicitation to commit a crime of violence" under 18 U.S.C. 373(a), because murder would not qualify under Section 373(a)'s "elements" test. That the federal statutes define the predicate offenses by focusing on the conduct of the assailant, rather than the impact on the victim, does not suggest Congress intended to exclude quintessential violent crimes such as murder. See *United States* v. *Nason*, 269 F.3d 10, 19-20 (1st Cir. 2001) (The fact that "two statutory schemes examine the same act from divergent perspectives does not mean that they are irreconcilable."). And any interpretation that excludes them is highly suspect.[13]

D. Interpreting Section 922(g)(9) To Require The Use Of "Violent" Force And To Exclude Bodily-Injury Assault Would Unduly Constrict The Scope Of The Statute

The interpretation of Section 921(a)(33)(A) adopted by the courts below not only conflicts with the terms of that provision, it undermines the effective application of Section 922(g)(9) in a manner that Congress could not have intended.

1. As this Court recognized in *Hayes*, "[f]irearms and domestic strife are a potentially deadly combination nationwide." 555 U.S. at 427. In enacting Section 922(g)(9), Congress sought to provide a nationwide solution to that nationwide problem by prohibiting the possession of firearms by those convicted of crimes against their families. Section 922(g)(9), a supplement to the federal felon-in-possession law, 18 U.S.C. 922(g)(1), was necessary because existing laws "were

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[13] If the Court concludes that assault by intentionally causing bodily injury has, as an element, the use of "physical force"—however that term is defined—it could reverse the decision below without deciding whether "physical force" requires "violent" force under Section 921(a)(33)(A). See Part A, *supra*. There are, however, good reasons for the Court to decide that predicate definitional question as well. More than half of the States and the District of Columbia have assault or battery laws that reach intentional offensive touching, see App. B, *infra*, 10a-16a, and whether those convictions qualify as "misdemeanor crime[s] of domestic violence" depends entirely on the meaning of the phrase "physical force." See *Johnson*, 559 U.S. at 136-145. That question has given rise to a significant and longstanding circuit split, see Pet. 20-22; it was squarely decided by the court of appeals below, see Pet. App. 5a-15a; and it is fully presented here.

not keeping firearms out of the hands of domestic abusers, because 'many people who engage in serious spousal or child abuse ultimately are not charged with or convicted of felonies.'" *Hayes*, 555 U.S. at 426 (quoting 142 Cong. Rec. at 22,985); see *id.* at 22,986 (statement of Sen. Wellstone) ("In all too many cases unfortunately, if you beat up or batter your neighbor's wife it is a felony. If you beat up or batter, brutalize your own wife or your own child, it is a misdemeanor."). Section 922(g)(9) was intended to "close this dangerous loophole" by "keeping firearms out of the hands of domestic abusers." *Hayes*, 555 U.S. at 426 (quoting 142 Cong. Rec. at 22,986); see 142 Cong. Rec. at 22,986, 22,987 (statements of Sens. Lautenberg & Wellstone).

2. The construction of Section 921(a)(33)(A) by the courts below "frustrate[s] that manifest purpose" because it would have rendered Section 922(g)(9) a practical nullity in nearly every State "from the very moment of its enactment." *Hayes*, 555 U.S. at 426-427.

As the Court noted in *Hayes*, most "domestic abusers were (and are) routinely prosecuted under generally applicable assault or battery laws." 555 U.S. at 427; see *Johnson*, 559 U.S. at 153 ("Cases of spousal and child abuse are frequently prosecuted under generally applicable assault and battery statutes"); Perkins 121 ("[W]ife beating is merely a particular instance of a battery.").[14] Virtually all of those generally applicable misdemeanor assault or battery statutes fall into one of two categories. The first group follows the common law and defines misdemeanor assault or battery (either by statute or by judicial construction) to include intentional offensive touching or the intentional causation of bodily injury. The Tennessee assault statute at issue here (see Tenn. Code Ann. § 39-13-101), the Florida battery statute at issue in *Johnson* (Fla. Stat. Ann. § 784.03(1)(a) (West 2000)), and the West Virginia battery statute at issue in *Hayes* (W. Va. Code Ann. § 61-2-9(c) (LexisNexis 2005)) all codify that common-law rule. And, at the time of Section 922(g)(9)'s enactment, 28 States (including the aforementioned), as well as the District of Columbia, had adopted that approach. See App. B, *infra*, 10a-16a; see also *Johnson*, 559 U.S. at 151 & n.3 (Alito, J., dissenting) (noting that "[a]lmost half of the States" have such statutes).

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[14] The traditional distinctions between assault and battery have blurred in recent years. A number of States (like Tennessee) punish the traditional elements of battery as "assault" or "assault and battery." See App. B, *infra*, 10a-20a; Model Penal Code § 211.1, cmt. 1, at 174 (noting that while the "common law dealt with these wrongs separately," it "more closely accords with mod-

The second group follows the Model Penal Code and defines assault or battery as, *inter alia*, the intentional causation of bodily injury. See Model Penal Code § 211.1(1)(a); *id.* § 211.1, cmt. 3, at 187 (explaining that "bodily injury" includes "pain, illness, or physical impairment caused indirectly," such as "by non-therapeutic administration of a drug or narcotic"). Under that approach, "[m]ere offensive contact" without more does not constitute simple assault or battery. *Id.* § 211.1, cmt. 2, at 185. At the time of Section 922(g)(9)'s enactment, 18 States had incorporated the Model Penal Code rule. See App. B, *infra*, 17a-19a.[15]

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ern understanding to deal with them under [the] single label" of "assault"); see also LaFave § 16.1 n.2, at 551.

[15] Under the federal assault statute, "[a]ssault by striking, beating, or wounding" and "[s]imple assault" are punishable as misde-

Several States have separately enacted domestic violence laws that are punishable as misdemeanors. As the Court noted in *Hayes*, only a minority of States had such statutes when Section 922(g)(9) was enacted. 555 U.S. at 427. Most of the domestic violence statutes largely track their generic assault or battery counterparts. Seven incorporate a definition of assault or battery that follows the common-law rule, while seven others adopt the Model Penal Code approach. See App. C, *infra*, 21a-24a. In the years since Section 922(g)(9) was enacted, more States have adopted statutes that specifically proscribe domestic violence as a misdemeanor offense. Those more recent statutes also generally cover the intentional causation of bodily injury, intentional offensive touching, or both. See App. D, *infra*, 26a-28a.

Under the decisions below, *none* of those statutes would give rise to a qualifying conviction under Section 922(g)(9). A conviction for intentional offensive touching would not qualify as a "misdemeanor crime of domestic violence" because it would not have, as an element, the use of "violent" physical force, as the court of appeals required. See Pet. App. 5a-15a; cf. *Johnson*, 559 U.S. at 138-145 (battery by "intentionally touch[ing]" the victim under Florida law does not require the use of "violent" force).[16] And a conviction

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meanors. 18 U.S.C. 113(a)(4) and (5); see *United States* v. *Delis*, 558 F.3d 177, 181-182 (2d Cir. 2009) (simple assault includes common-law battery); *id.* at 183 (citing cases).

[16] See also *United States* v. *White*, 606 F.3d 144, 153 (4th Cir. 2010) (domestic assault and battery by intentionally touching the victim under Virginia law does not require the use of "violent" force); *Hays*, 526 F.3d at 675, 681 (simple assault and battery by intentionally touching the victim under Wyoming law does not require the use of "violent" force); *United States* v. *Belless*, 338

for intentionally causing bodily injury would not constitute a "misdemeanor crime of domestic violence" either because (under the Sixth Circuit's reasoning) it would not have, as an element, the use of "violent" force, or (under the district court's reasoning) it would not have, as an element, the use of *any* force. See Pet. App. 15a-17a, 40a-41a.[17] Accordingly, convictions under the generic and domestic misdemeanor assault or battery laws in all but (at most) a handful of States would not qualify as "misdemeanor crime[s] of domestic violence" under Section 922(g)(9).[18]

F.3d 1063, 1065, 1067-1069 (9th Cir. 2003) (simple assault and battery by intentionally touching the victim under Wyoming law does not require the use of "violent" force).

[17] See *Hagen*, 349 Fed. Appx. at 897 (assault of a family member by intentionally causing bodily injury under Texas law does not require the use of physical force); cf. *Villegas-Hernandez*, 468 F.3d at 878-883 (assault by intentionally causing bodily injury under Texas law does not require the use of physical force); *Perez-Vargas*, 414 F.3d at 1285-1287 (assault by knowingly causing bodily injury under Colorado law does not require the use of physical force); *Chrzanoski*, 327 F.3d at 192-196 (assault by intentionally causing physical injury under Connecticut law does not require the use of physical force).

[18] That is not to suggest that the misdemeanor assault and battery laws in the remaining few States would qualify as "misdemeanor crime[s] of domestic violence" under the decisions below. See App. B, *infra*, 20a (listing miscellaneous statutes); App. C, *infra*, 25a (same); App. D, *infra*, 29a (same). In most cases, they would not. See, *e.g.*, Alaska Stat. Ann. § 11.41.230 (1995) ("A person commits the crime of assault in the fourth degree if," *inter alia*, "that person recklessly causes physical injury to another person."); Iowa Code Ann. § 708.1 (West 1995) ("A person commits an assault when, without justification, the person," *inter alia*, commits "[a]ny act which is intended to cause pain or injury to, or which is intended to result in physical contact which will be insult-

That cannot be the law. Such an interpretation would render Section 922(g)(9) a virtual "dead letter" in all but (at most) a handful of States "from the very moment of its enactment." *Hayes*, 555 U.S. at 426-427 (rejecting an interpretation of Section 921(a)(33)(A) that would have rendered Section 922(g)(9) "'a dead letter' in some two-thirds of the States from the very moment of its enactment") (citation omitted); see *Nijhawan* v. *Holder*, 557 U.S. 29, 40 (2009) (rejecting a reading of 8 U.S.C. 1101(a)(43)(M)(i) that would leave the provision with little application, doubting "Congress would have intended (M)(i) to apply in so limited and so haphazard a manner"); *Taylor*, 495 U.S. at 594 (declining to construe the ACCA's reference to "burglary" as meaning "common-law burglary," explaining that such a construction "would come close to nullifying that term's effect in the statute, because few of the crimes now generally recognized as burglaries would fall within the common-law definition"). Given the "paucity of state" statutes that conform to the lower courts' approach, it is "highly improbable that Congress meant to extend [Section] 922(g)(9)'s firearm possession ban only to the relatively few domestic abusers prosecuted" under the laws of a couple of States. *Hayes*, 555 U.S. at 427.[19]

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ing or offensive to another, coupled with the apparent ability to execute the act.").

[19] Domestic-violence related offenses may be prosecuted under statutes other than generic or domestic assault and battery laws. See, *e.g.*, Ala. Code § 13A-6-132(a) (West 2013) (later enacted domestic violence law defines "domestic violence" to include several additional offenses including, for example, harassment); Nev. Rev. Stat. Ann. § 200.485(1) (West 2013) (similar). But a number of those misdemeanor convictions would likewise fail to satisfy a heightened standard and, in any event, the Court should

3. The practical effect of the decisions below cannot be mitigated by resort to the "modified categorical approach." In *Descamps*, the Court explained that the modified categorical approach is available "when a prior conviction is for violating a so-called 'divisible statute,'" *i.e.*, a statute that "sets out one or more elements of the offense in the alternative." 133 S. Ct. at 2281. Accordingly, the modified categorical approach would be available (at least theoretically) if a statute of conviction defined assault or battery as either "intentional offensive touching" or "the use of violent physical force."[20] Similarly, it would theoretically be available if a state statute defined assault or battery as either "causing bodily injury by the use of violent physical force" or "causing bodily injury by poisoning the victim" or, perhaps, "causing bodily injury by deceit."

But *Descamps* also held that "sentencing courts may not apply the modified categorical approach when the crime of which the defendant was convicted has a

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not attribute to Congress an intent to close what it viewed as a "dangerous loophole" (*Hayes*, 555 U.S. a 426 (citation omitted)) in such a "limited" and "haphazard" manner (*Nijhawan*, 557 U.S. at 40).

[20] Even when the statute is divisible, the modified categorical approach may often be unavailable in practice because state and local records generally track the statutory language and do not specify which one (of several) disjunctive elements the defendant violated. And records from closed misdemeanor cases are often incomplete. See *Johnson*, 559 U.S. at 145 (acknowledging that it "may well be true * * * that in many cases state and local records from battery convictions will be incomplete"); *id.* at 152 (Alito, J., dissenting) (agreeing that it will "often be impossible" for the government "to produce documents" to satisfy the modified categorical approach because, *inter alia*, "charging documents frequently simply track the language of the statute").

single, indivisible set of elements." 133 S. Ct. at 2282. And in this context state statutes are generally written in an indivisible, rather than divisible, fashion. The type of force actually used will rarely be a disjunctive element of a domestic or generic assault or battery offense. And the particular means used to inflict bodily injury (by force or deceit, for example) will rarely appear as separate elements.[21] Thus, even if the charging documents or the jury instructions made clear that the defendant in fact beat his wife by punching her in the face (rather than "poison[ing]" her (Pet. App. 41a) or "tickl[ing]" her with a feather (*Flores*, 350 F.3d at 670)), those details could not convert an otherwise non-qualifying offense into a "misdemeanor crime of domestic violence."

The Court in *Johnson* suggested that the modified categorical approach would still have some role to play in determining whether the predicate offense involved the use of "violent" force for purposes of the ACCA. 559 U.S. at 144-145. That suggestion makes sense when read alongside the Court's assumption that the other ways of committing battery under Florida law (including by intentionally causing bodily harm) would have involved the use of "violent" force and, thus, would have qualified as a "violent felony." See *id.* at 136; see also note 8, *supra*. But the Sixth Circuit's decision turned that assumption on its head. Under that decision, the vast majority of misdemeanor assault and battery laws do *not* "contain[] statutory phrases that cover several different generic crimes,

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[21] A few state assault and battery statutes do separately prohibit the intentional administration of poison or other controlled substances. See, *e.g.*, Ark. Code Ann. § 5-13-203(a)(4) (West 2013); La. Rev. Stat. Ann. § 14:33 (2013).

some of which require violent force and some of which do not." *Johnson*, 559 U.S. at 144 (emphasis added). And in a world where neither intentional offensive touching nor the intentional causation of bodily injury are sufficient, the modified categorical approach has precious little work to do.[22]

4. The damaging impact of the court of appeals' decision is by no means limited to criminal prosecutions under Section 922(g)(9). Under the Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (primarily codified at 18 U.S.C. 922(s)-(t)), federally licensed firearms dealers must verify that individuals who wish to purchase firearms are not prohibited from doing so under state or federal law. See 18 U.S.C. 922(t)(1); 28 C.F.R. 25.1. That verification is performed using the National Instant Criminal Background Check System (NICS), a computer system maintained by the Federal Bureau of Investigation (FBI). See 28 C.F.R. 25.3, 25.4. NICS, in turn, advises the licensee whether a prospective purchaser is prohibited by law from possessing or receiving a firearm. See 63 Fed. Reg. 58,272 (Oct. 29, 1998). Between NICS's creation in November 1998 and December 2012, misdemeanor crime of domestic violence convictions have accounted for more than 100,000 federal denials—the second most common reason for denying firearms to a prospective purchaser. See FBI, *National Instant Background Check System (NICS) Operations 2012*, http://www.fbi.gov/

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[22] The modified categorical approach would still have a role to play with respect to disjunctive intent elements, see note 5, *supra*, but that would be irrelevant if the force requirement could not be satisfied.

about-us/cjis/nics/reports/2012-operations-report (last visited Nov. 14, 2013).[23]

Under the Sixth Circuit's decision, that will no longer be true. Many persons convicted of domestic-violence related offenses will now be able to legally purchase a firearm. A domestic abuser who is convicted of a misdemeanor assault or battery offense in most (if not all) of the 50 States and the District of Columbia will be able to arm himself—even though there can be no serious dispute that "the great majority of convictions under" those statutes are "based on the use of violent force," *Johnson*, 559 U.S. at 152 (Alito, J., dissenting). The court of appeals' and the district court's interpretations thus frustrate (if not destroy) Congress's "manifest purpose" to "keep[] firearms out of the hands of domestic abusers." *Hayes*, 555 U.S. at 426-427.

E. The Statute's History Further Confirms That Only The Common-Law Meaning Of "Force" Can Effectuate Congress's Intent

1. Section 922(g)(9)'s "drafting history" is admittedly limited, *Hayes*, 555 U.S. at 429, but it reveals a general understanding that domestic abusers were often prosecuted under generic assault and battery laws—and that Congress intended such laws to qualify as "misdemeanor crime[s] of domestic violence" under the newly enacted statutory provision. As the Court explained in *Hayes*, Senator Frank Lautenberg, the sponsor of the provision, observed in a floor statement

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[23] In 2013, misdemeanor crime of domestic violence convictions fell to the third spot, slightly behind fugitives from justice. See FBI, *Federal Denials*, http://www.fbi.gov/about-us/cjis/nics/reports/federal-denials-100313.pdf (last visited Nov. 14, 2013).

that "[c]onvictions for domestic violence-related crimes often are for crimes, *such as assault*, that are not explicitly identified as related to domestic violence." 555 U.S. at 428 (emphasis added) (quoting 142 Cong. Rec. at 26,675); cf. 142 Cong. Rec. at 19,415 (statement of Sen. Lautenberg) ("Assault your ex-wife, lose your gun.").

The Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) has read Section 921(a)(33)(A) in a manner consistent with Senator Lautenberg's interpretation. In 1998, ATF amended its regulations concerning commerce in firearms and ammunition to implement Section 922(g)(9). See *Implementation of Public Law 104208, Omnibus Consolidated Appropriations Act of 1997*, 63 Fed. Reg. 35,520 (June 30, 1998); cf. 18 U.S.C. 926. The regulations define the term "[m]isdemeanor crime of domestic violence" as an offense that, *inter alia*, "[h]as, as an element, the use or attempted use of physical force (e.g., assault and battery)." 27 C.F.R. 478.11; see 27 C.F.R. 478.32(a)(9). In promulgating the regulation, ATF explained that:

> The definition of misdemeanor crime of domestic violence includes all offenses that have as an element the use or attempted use of physical force (*e.g.*, assault and battery) if the offense is committed by one of the defined parties. * * * For example, a person convicted of misdemeanor assault and battery against his or her spouse would be prohibited from receiving or possessing firearms or ammunition.

63 Fed. Reg. at 35,521.

Since the ATF promulgated its regulation, Congress has several times amended Sections 921 and

922. Congress has never, however, repudiated the ATF's clear understanding that "assault and battery" offenses are the quintessential example of the sort of misdemeanor offense that would have, as an element, the use of physical force. Indeed, in the NICS Improvement Amendments Act of 2007, Pub. L. No. 110-180, 121 Stat. 2559 (18 U.S.C. 922 note (Supp. V 2011)), Congress incorporated the existing statutory definition of the term without change. *Id.* § 3, 121 Stat. 2561. That Congress has not altered the ATF's interpretation suggests that the ATF has correctly interpreted the statutory language. See, *e.g.*, *North Haven Bd. of Educ.* v. *Bell*, 456 U.S. 512, 535 (1982).

2. In his brief in opposition, respondent argued that the "statutory background" confirms that Congress was concerned with "*violent* conduct." Br. in Opp. 11-12. That is surely correct. Congress *was* concerned with "violent conduct" and "serious spousal or child abuse." 142 Cong. Rec. at 19,415 (statement of Sen. Lautenberg). It did not want a husband who "first treated" his wife "to a fist in the face" to later "come home with a gun and take" her life. *Id.* at 22,987. And Congress did not want someone who "beat his wife brutally" but "pleaded down to a misdemeanor" to later "reach for the gun he keeps in his drawer." *Id.* at 26,674.

The decisions below that respondent defends thwart that undisputed purpose. As explained above (see Part D, *supra*), the vast majority of domestic-violence related misdemeanor offenses (including those from Senator Lautenberg's home state) would not qualify as "misdemeanor crime[s] of domestic violence" under the Sixth Circuit's or the district court's approach—even when the underlying abusive conduct was "serious" or "violent" under any conceivable definition. Accordingly, the husband who "treat[s]" his wife "to a fist in the face" *will* have the opportunity to "come home with a gun and take" her life. The man who "beat his wife brutally" but "pleaded down to a misdemeanor" *will* be able to later "reach for the gun he keeps in his drawer." And the "dangerous loophole" Congress sought to close would remain wide open. In contrast, applying Section 922(g)(9) to cover the classic assault and battery statutes that were and are commonly used to prosecute spousal abuse and domestic violence would fill the gap that Congress intended to address.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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NOVEMBER 2013

APPENDIX A

1. 18 U.S.C. 921 provides in pertinent part:

Definitions

(a) As used in this chapter—

* * * * *

(33)(A) Except as provided in subparagraph (C)[2], the term "misdemeanor crime of domestic violence" means an offense that—

(i) is a misdemeanor under Federal, State, or Tribal[3] law; and

(ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.

(B)(i) A person shall not be considered to have been convicted of such an offense for purposes of this chapter, unless—

(I) the person was represented by counsel in the case, or knowingly and intelligently waived the right to counsel in the case; and

(II) in the case of a prosecution for an offense described in this paragraph for which a person was entitled to a jury trial in the jurisdiction in which the case was tried, either

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[2] So in original. No subparagraph (C) has been enacted.

[3] So in original. Probably should not be capitalized

(aa) the case was tried by a jury, or

(bb) the person knowingly and intelligently waived the right to have the case tried by a jury, by guilty plea or otherwise.

(ii) A person shall not be considered to have been convicted of such an offense for purposes of this chapter if the conviction has been expunged or set aside, or is an offense for which the person has been pardoned or has had civil rights restored (if the law of the applicable jurisdiction provides for the loss of civil rights under such an offense) unless the pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

* * * * *

2. 18 U.S.C. 922 provides in pertinent part:

Unlawful Acts

* * * * *

(g) It shall be unlawful for any person—

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

(2) who is a fugitive from justice;

(3) who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802));

(4) who has been adjudicated as a mental defective or who has been committed to a mental institution;

(5) who, being an alien—

(A) is illegally or unlawfully in the United States; or

(B) except as provided in subsection (y)(2), has been admitted to the United States under a nonimmigrant visa (as that term is defined in section 101(a)(26) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(26)));

(6) who has been discharged from the Armed Forces under dishonorable conditions;

(7) who, having been a citizen of the United States, has renounced his citizenship;

(8) who is subject to a court order that—

(A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;

(B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and

(C)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; or

(9) who has been convicted in any court of a misdemeanor crime of domestic violence,

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

* * * * *

3. 18 U.S.C. 924 provides in pertinent part:

Penalties

(e)(2) As used in this subsection—

* * * * *

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and

* * * * *

4. Tennessee Code Ann. § 39-13-101 (West 2001) provides:

Assault.—

(a) A person commits assault who:

(1) Intentionally, knowingly or recklessly causes bodily injury to another;

(2) Intentionally or knowingly causes another to reasonably fear imminent bodily injury; or

(3) Intentionally or knowingly causes physical contact with another and a reasonable person would regard the contact as extremely offensive or provocative.

(b) Assault is a Class A misdemeanor unless the offense is committed under subdivision (a)(3), in which event assault is a Class B misdemeanor

5. Tennessee Code Ann. § 39-11-106 (West 2001) provides in pertinent part:

(a) As used in this title, unless the context requires otherwise:

* * * * *

(2) "Bodily injury" includes a cut, abrasion, bruise, burn or disfigurement; and physical pain or temporary illness or impairment of the function of a bodily member, organ, or mental faculty;

6. Tennessee Code Ann. § 39-13-111 (West 2001) provides:

> (a) As used in this section, "family or household member" means spouse, former spouse, person related by blood or marriage, or person who currently resides or in the past has resided with that person as if a family, or a person who has a child or children in common with that person regardless of whether they have been married or resided together at any time.
>
> (b) A person who commits domestic assault who commits an assault as defined in § 39-13-101 against a person who is that person's family or household member.
>
> (c) Domestic assault is punishable the same as assault in § 39-13-101.

7. Tennessee Code Ann. § 39-13-111 (West Supp. 2012) provides:

Domestic assault.

(a) As used in this section, "domestic abuse victim" means any person who falls within the following categories:

> (1) Adults or minors who are current or former spouses;
>
> (2) Adults or minors who live together or who have lived together;
>
> (3) Adults or minors who are dating or who have dated or who have or had a sexual relationship, but does not include fraternization between two (2) individuals in a business or social context;

(4) Adults or minors related by blood or adoption;

(5) Adults or minors who are related or were formerly related by marriage; or

(6) Adult or minor children of a person in a relationship that is described in subdivisions (a)(1)-(5).

(b) A person commits domestic assault who commits an assault as defined in § 39-13-101 against a domestic abuse victim.

(c)(1) A first conviction for domestic assault and a second or subsequent conviction for domestic assault committed in a manner prohibited by § 39-13-101(a)(2) and (a)(3) is punishable the same as assault under § 39-13-101, and additionally, as provided in subdivisions (c)(2) and (c)(3) and subsection (d) of this section.

(2) A second conviction for domestic assault committed in a manner prohibited by § 39-13-101(a)(1) is punishable by a fine of not less than three hundred fifty dollars ($350) nor more than three thousand five hundred dollars ($3,500), and by confinement in the county jail or workhouse for not less than thirty (30) days, nor more than eleven (11) months and twenty-nine (29) days.

(3) A third or subsequent conviction for domestic assault committed in a manner prohibited by § 39-13-101(a)(1), is punishable by a fine of not less than one thousand one hundred dollars ($1,100) nor more than five thousand dollars ($5,000), and by confinement in the county jail or workhouse for not less than ninety (90) days, nor more than eleven (11) months and twenty-nine (29) days.

(4) For purposes of this section, a person who is convicted of a violation of § 39-13-111 committed in a manner prohibited by § 39-13-101(a)(1), shall not be subject to the enhanced penalties prescribed in this subsection (c), if ten (10) or more years have elapsed between the date of the present violation and the date of any immediately preceding violation of § 39-13-111, committed in a manner prohibited by § 39-13-101(a)(1), that resulted in a conviction for such offense.

(5) In addition to any other punishment that may be imposed for a violation of this section, if, as determined by the court, the defendant possesses the ability to pay a fine in an amount not in excess of two hundred twenty-five dollars ($225), then the court shall impose a fine at the level of the defendant's ability to pay, but not in excess of two hundred twenty-five dollars ($225). The additional fine shall be paid to the clerk of the court imposing sentence, who shall transfer it to the state treasurer, who shall credit the fine to the general fund. All fines so credited to the general fund shall be subject to appropriation by the general assembly for the exclusive purpose of funding family violence shelters and shelter services. This appropriation shall be in addition to any amount appropriated pursuant to § 67-4-411.

(6) A person convicted of a violation of this section shall be required to terminate, upon conviction, possession of all firearms that the person possesses as required by § 36-3-625.

(d) As part of a defendant's alternative sentencing for a violation of this section, the sentencing judge may direct the defendant to complete a drug or alcohol treatment program or available counseling programs that address violence and control issues including, but not limited to, a batterer's intervention program that has been certified by the domestic violence state coordinating council. Completion of a noncertified batterer's intervention program shall only be ordered if no certified program is available in the sentencing county. No batterer's intervention program, certified or noncertified, shall be deemed complete until the full term of the program is complete, and a judge may not require a defendant to attend less than the full term of a program as part of a plea agreement or otherwise. The defendant's knowing failure to complete such an intervention program shall be considered a violation of the defendant's alternative sentence program and the sentencing judge may revoke the defendant's participation in such program and order execution of sentence.

APPENDIX B

STATE MISDEMEANOR ASSAULT AND BATTERY STATUTES IN EFFECT WHEN SECTION 922(G)(9) WAS ENACTED

Bodily Injury or Offensive Touching Statutes:

Arizona: Ariz. Rev. Stat. Ann. § 13-1203(A) (1995) ("A person commits assault by," *inter alia*, "intentionally[] [or] knowingly * * * causing any physical injury to another person" or "[k]nowingly touching another person with the intent to injure, insult or provoke such person.").

California: Cal. Penal Code § 242 (West 1995) ("A battery is any willful and unlawful use of force or violence upon the person of another."); *People* v. *Pinholster*, 824 P.2d 571, 622 (Cal.) ("[A]ny harmful or offensive touching constitutes an unlawful use of force or violence.") (brackets in original; citation omitted), cert. denied, 506 U.S. 921 (1992).

Delaware: Del. Code Ann. tit. 11, § 601 (West 1995) ("One is guilty of offensive touching when one intentionally touches another person * * * knowing that one is thereby likely to cause offense or alarm to such other person."); *id.* § 611 ("A person is guilty of assault in the third degree when," *inter alia*, "[t]he person intentionally * * * causes physical injury to another person.").

District of Columbia: D.C. Code § 22-504(a) (1995) (setting out penalties for assault); *Ray* v. *United States*, 575 A.2d 1196, 1199 (D.C. 1990) ("[A]n assault conviction will be upheld when the assaultive act is merely offensive, even though it causes or threatens no actual physical harm to the victim.").

Florida: Fla. Stat. Ann. § 784.03(1) (West 1995) ("A person commits battery if he" "[a]ctually and intentionally touches or strikes another person against the will of the other" or "[i]ntentionally causes bodily harm to an individual.").

Georgia: Ga. Code Ann. § 16-5-23(a) (West 1995) ("A person commits the offense of simple battery when he" "[i]ntentionally makes physical contact of an insulting or provoking nature with the person of another" or "[i]ntentionally causes physical harm to another."); *id.* § 16-5-23.1(a) ("A person commits the offense of battery when he intentionally causes substantial physical harm or visible bodily harm to another.").

Illinois: 720 Ill. Comp. Stat. Ann. § 5/12-3(a) (West 1995) ("A person commits battery if he intentionally or knowingly without legal justification and by any means" "causes bodily harm to an individual" or "makes physical contact of an insulting or provoking nature with an individual.").

Indiana: Ind. Code Ann. § 35-42-2-1(1)(a) (West 1995) ("A person who knowingly or intentionally touches another person in a rude, insolent, or angry manner commits battery, a Class B misdemeanor."); *id.* § 35-42-2-1(1)(a)(1) (providing that battery is a "Class A misdemeanor if it results in bodily injury to any other person").

Kansas: Kan. Stat. Ann. § 21-3412 (West 1995) ("Battery is," *inter alia,* "[i]ntentionally * * * causing bodily harm to another person" or "intentionally causing physical contact with another person when done in a rude, insulting or angry manner.").

Louisiana: La. Rev. Stat. Ann. § 14:33 (1995) ("Battery is," *inter alia*, "the intentional use of force or violence upon the person of another."); *State* v. *Schenck*, 513 So.2d 1159, 1165 (La. 1987) ("An essential element of battery is 'physical contact whether injurious or merely offensive.'") (citation omitted).

Maine: Me. Rev. Stat. Ann. tit. 17-A, § 207 (1995) ("A person is guilty of assault if he," *inter alia*, "intentionally[] [or] knowingly * * * causes bodily injury or offensive physical contact to another.").

Maryland: *Snowden* v. *State*, 583 A.2d 1056, 1059 (Md. 1991) ("Battery * * * is the unlawful application of force to the person of another."); *Kellum* v. *State*, 162 A.2d 473, 476 (Md. 1960) ("It is well settled that any unlawful force used against the person of another, no matter how slight, will constitute a battery.").[1]

Massachusetts: Mass. Gen. Laws Ann. ch. 265, § 13A (West 1995) (setting out penalties for assault and assault and battery); *Commonwealth* v. *Campbell*, 226 N.E.2d 211, 218 (Mass. 1967) ("An assault and battery is the intentional and unjustified use of force upon the person of another, however slight.") (citation omitted).

Michigan: Mich. Comp. Laws Ann. § 750.81(1) (West 1995) (setting out penalties for assault and assault and battery); *People* v. *Nickens*, 685 N.W.2d

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[1] Maryland has now codified its common-law misdemeanor battery offense. Md. Code Ann., Crim. Law § 3-201(b) (West 2013) ("'Assault' means the crimes of assault, battery, and assault and battery, which retain their judicially determined meanings."); *Robinson* v. *State*, 728 A.2d 698, 701-702 (Md. 1999) (describing shift from common-law to statutory crimes).

657, 661 (Mich. 2004) ("[A] battery is an intentional, unconsented and harmful or offensive touching of the person of another, or of something closely connected with the person.") (citation and internal quotation marks omitted).

Missouri: Mo. Ann. Stat. § 565.070(1)(1) and (5) (West 1995) ("A person commits the crime of assault in the third degree if," *inter alia*, the person "recklessly causes physical injury to another person" or "knowingly causes physical contact with another person knowing the other person will regard the contact as offensive or provocative.").

Montana: Mont. Code Ann. § 45-5-201(1)(a) and (c) (1995) ("A person commits the offense of assault if" the person, *inter alia*, "purposely or knowingly causes bodily injury to another" or "purposely or knowingly makes physical contact of an insulting or provoking nature with any individual.").

Nevada: Nev. Rev. Stat. Ann. § 200.481(1)(a) (West 1995) ("'Battery' means any willful and unlawful use of force or violence upon the person of another."); *Hobbs* v. *State*, 251 P.3d 177, 180 (Nev. 2011) ("[B]attery is the intentional and unwanted exertion of force upon another, however slight.").

New Hampshire: N.H. Rev. Stat. Ann. § 631: 2-a(I)(a) (1995) ("A person is guilty of simple assault if" the person, *inter alia*, "[p]urposely or knowingly causes bodily injury or unprivileged physical contact to another.").

New Mexico: N.M. Stat. Ann. § 30-3-4 (West 1995) ("Battery is the unlawful, intentional touching or application of force to the person of another, when done in a rude, insolent or angry manner.").

North Carolina: N.C. Gen. Stat. Ann. § 14-33(a) (West 1995) ("Any person who commits a simple assault or a simple assault and battery or participates in a simple affray is guilty of a Class 2 misdemeanor."); *State* v. *West*, 554 S.E.2d 837, 840 (N.C. Ct. App. 2001) (Battery is "the unlawful application of force to the person of another by the aggressor himself, or by some substance which he puts in motion," and "may be proved by evidence of any unlawful touching of [a] person.") (brackets in original; citation omitted).

Oklahoma: Okla. Stat. Ann. tit. 21, § 642 (West 1995) ("A battery is any willful and unlawful use of force or violence upon the person of another."); *Steele* v. *State*, 778 P.2d 929, 931 (Okla. Crim. App. 1989) ("[O]nly the slightest touching is necessary to constitute the 'force or violence' element of battery.").

Rhode Island: R.I. Gen. Laws § 11-5-3(a) (West 1995) (setting out penalties for simple assault and battery); *State* v. *Coningford*, 901 A.2d 623, 630 (R.I. 2006) (Battery "refers to an act that was intended to cause, and does cause, an offensive contact with or unconsented touching of or trauma upon the body of another.") (citation and internal quotation marks omitted).

South Carolina: *State* v. *Mims*, 335 S.E.2d 237, 237 (S.C. 1985) (per curiam) ("Assault and battery is defined as 'any touching of the person of an individual in a rude or angry manner, without justification.'") (citation omitted).[2]

Tennessee: Tenn. Code Ann. § 39-13-101(a)(1) and (3) (West 1995) ("A person commits assault" when the person, *inter alia*, "[i]ntentionally[] [or] knowingly * * * causes bodily injury to another" or "[i]ntentionally or knowingly causes physical contact with another and a reasonable person would regard the contact as extremely offensive or provocative.").

Texas: Tex. Penal Code Ann. § 22.01(a)(1) and (3) (West 1996) ("A person commits an [assault] if the person," *inter alia*, "intentionally[] [or] knowingly * * * causes bodily injury to another" or "intentionally or knowingly causes physical contact with another person when the person knows or should reasonably believe that the other will regard the contact as offensive or provocative.").

Virginia: Va. Code Ann. § 18.2-57 (West 1995) (setting out penalties for simple assault and assault and battery); *Wood* v. *Commonwealth*, 140 S.E. 114, 115 (Va. 1927) ("A battery consists of the wilful or unlawful touching of the person of another by the assailant, or by some object set in motion by him.").

Washington: Wash. Rev. Code Ann. § 9A.36.041(1) (West 1995) ("A person is guilty of assault in the fourth degree if, under circumstances not amounting to assault in the first, second, or third degree, or custodial assault, he or she assaults another."); *State* v.

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[2] South Carolina has now codified an assault and battery offense. S.C. Code Ann. § 16-3-600(E)(1) (2013) ("A person commits the offense of assault and battery in the third degree if the person," *inter alia*, "unlawfully injures another person.").

Stevens, 143 P.3d 817, 821 (Wash. 2006) ("The term assault itself is not statutorily defined so Washington courts apply the common law definition" which includes, *inter alia*, "an unlawful touching with criminal intent.").

West Virginia: W. Va. Code Ann. § 61-2-9(c) (West 1995) (defining battery as "unlawfully and intentionally mak[ing] physical contact of an insulting or provoking nature with the person of another or unlawfully and intentionally caus[ing] physical harm to another person").

Wyoming: Wyo. Stat. Ann. § 6-2-501(b) (West 1995) ("A person is guilty of battery if he unlawfully touches another in a rude, insolent or angry manner or intentionally[] [or] knowingly * * * causes bodily injury to another.").[3]

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[3] Wyoming has since amended its simple assault statute in response to the Tenth Circuit's decision in *United States* v. *Hays*, 526 F.3d 674 (2008). See Wyo. Stat. Ann. § 6-2-501(b) (2013) ("A person is guilty of battery if he intentionally[] [or] knowingly * * * causes bodily injury to another person by use of physical force."); *id.* § 6-2-501(g) ("A person is guilty of unlawful contact if he," *inter alia*, "[t]ouches another person in a rude, insolent or angry manner without intentionally using sufficient physical force to cause bodily injury to another.").

Bodily Injury Statutes:

Alabama: Ala. Code § 13A-6-22(a)(1) (1995) ("A person commits the crime of assault in the third degree if," *inter alia*, "[w]ith intent to cause physical injury to another person, he causes physical injury to any person.").

Arkansas: Ark. Code Ann. § 5-13-203 (West 1995) ("A person commits battery in the third degree" by, *inter alia*, "purpose[ly] * * * causing physical injury to another person.").

Colorado: Colo. Rev. Stat. Ann. § 18-3-204 (West 1995) ("A person commits the crime of assault in the third degree if he," *inter alia*, "knowingly * * * causes bodily injury to another person.").

Connecticut: Conn. Gen. Stat. Ann. § 53a-61(a) (West 1995) ("A person is guilty of assault in the third degree when," *inter alia*, "[w]ith intent to cause physical injury to another person, he causes such injury to such person or to a third person.").

Hawaii: Haw. Rev. Stat. § 707-712(1)(a) (West 1995) ("A person commits the offense of assault in the third degree if he," *inter alia*, "[i]ntentionally[] [or] knowingly * * * causes bodily injury to another person.").

Kentucky: Ky. Rev. Stat. Ann. § 508.030(1)(a) (West 1995) ("A person is guilty of assault in the fourth degree when," *inter alia*, the person "intentionally * * * causes physical injury to another person.").

Minnesota: Minn. Stat. Ann. § 609.224(1) (West 1995) (A person "commits an assault" when that person, *inter alia*, "intentionally inflicts * * * bodily harm upon another.").

Mississippi: Miss. Code Ann. § 97-3-7(1)(a) (West 1995) ("A person is guilty of simple assault if he," *inter alia*, "purposely[] [or] knowingly * * * causes bodily injury to another.").

Nebraska: Neb. Rev. Stat. § 28-310(1)(a) (West 1995) ("A person commits the offense of assault in the third degree if" the person, *inter alia*, "[i]ntentionally[] [or] knowingly * * * causes bodily injury to another person.").

New Jersey: N.J. Stat. Ann. § 2C:12-1(a)(1) (West 1995) ("A person is guilty of assault if" the person, *inter alia*, "purposely[] [or] knowingly * * * causes bodily injury to another.").

New York: N.Y. Penal Law § 120.00(1) (McKinney 1995) ("A person is guilty of assault in the third degree when," *inter alia*, "[w]ith intent to cause physical injury to another person, he causes such injury to such person or to a third person.").

North Dakota: N.D. Cent. Code Ann. § 12.1-17-01 (West 1995) ("A person is guilty of a [simple assault] if that person," *inter alia*, "[w]illfully causes bodily injury to another human being.").

Ohio: Ohio Rev. Code Ann. § 2903.13(A) (West 1995) ("No person shall knowingly cause * * * physical harm to another.").

Oregon: Or. Rev. Stat. Ann. § 163.160(1)(a) (West 1995) ("A person commits the crime of assault in the fourth degree if the person," *inter alia*, "[i]ntentionally[] [or] knowingly * * * causes physical injury to another.").

Pennsylvania: 18 Pa. Cons. Stat. Ann. § 2701(a) (West 1995) ("A person is guilty of assault" if the person, *inter alia*, "intentionally[] [or] knowingly * * * causes bodily injury to another.").

South Dakota: S.D. Codified Laws § 22-18-1(5) (1995) ("Any person who," *inter alia*, "[i]ntentionally causes bodily injury to another which does not result in serious bodily injury[] is guilty of simple assault.").

Vermont: Vt. Stat. Ann. tit. 13, § 1023(a)(1) (West 1995) ("A person is guilty of simple assault if he," *inter alia*, "purposely[] [or] knowingly * * * causes bodily injury to another.").

Wisconsin: Wis. Stat. Ann. § 940.19 (West 1996) (defining battery as "caus[ing] bodily harm to another by an act done with the intent to cause bodily harm to that person or another without the consent of the person so harmed").

Miscellaneous Statutes:

Alaska: Alaska Stat. Ann. § 11.41.230(a)(1) (West 1995) ("A person commits the crime of assault in the fourth degree if," *inter alia*, "that person recklessly causes physical injury to another person.").

Idaho: Idaho Code Ann. § 18-903 (West 1995) ("A battery is any" "[w]illful and unlawful use of force or violence upon the person of another," "[a]ctual, intentional and unlawful touching or striking of another person against the will of the other," or "[u]nlawfully and intentionally causing bodily harm to an individual.").

Iowa: Iowa Code Ann. § 708.1(1) (West 1995) ("A person commits an assault when, without justification, the person," *inter alia*, commits "[a]ny act which is intended to cause pain or injury to, or which is intended to result in physical contact which will be insulting or offensive to another, coupled with the apparent ability to execute the act.").

Utah: Utah Code Ann. § 76-5-102(1)(c) (West 1995) ("Assault is," *inter alia*, "an act, committed with unlawful force or violence, that causes or creates a substantial risk of bodily injury to another.").

APPENDIX C

STATE MISDEMEANOR DOMESTIC VIOLENCE STATUTES IN EFFECT WHEN SECTION 922(g) WAS ENACTED

Bodily Injury or Offensive Touching Statutes:

California: Cal. Penal Code § 243(e)(1) (West 1995) (defining domestic violence as "a battery * * * committed against [a family or household member]"); *id.* § 242 ("A battery is any willful and unlawful use of force or violence upon the person of another."); *People* v. *Pinholster*, 824 P.2d 571, 622 (Cal.) ("[A]ny harmful or offensive touching constitutes an unlawful use of force or violence.") (brackets in original; citation omitted), cert. denied, 506 U.S. 921 (1992).

Illinois: 720 Ill. Comp. Stat. Ann. § 5/12-3.2(a) (West 1995) ("A person commits Domestic Battery if he intentionally or knowingly without legal justification by any means" "[c]auses bodily harm to" or "[m]akes physical contact of an insulting or provoking nature with any [enumerated] family or household member.").

Michigan: Mich. Comp. Laws Ann. § 750.81(2) (West 1995) ("[A]n individual who assaults or assaults and batters [a family or household member] is guilty of a misdemeanor."); *People* v. *Nickens*, 685 N.W.2d 657, 661 (Mich. 2004) ("[A] battery is an intentional, unconsented and harmful or offensive touching of the person of another, or of something closely connected with the person.") (citation and internal quotation marks omitted).

New Mexico: N.M. Stat. Ann. § 30-3-15(A) (West 1995) ("Battery against a household member consists of the unlawful, intentional touching or application of force to the person of a household member, when done in a rude, insolent or angry manner.").

Oklahoma: Okla. Stat. Ann. tit. 21, § 644(C) (West 1996) (defining domestic abuse as assault and battery against a family or household member); *id.* § 642 ("A battery is any willful and unlawful use of force or violence upon the person of another."); *Steele* v. *State*, 778 P.2d 929, 931 (Okla. Crim. App. 1989) ("[O]nly the slightest touching is necessary to constitute the 'force or violence' element of battery.").

Virginia: Va. Code Ann. § 18.2-57.2(A) (West 1995) ("Any person who commits an assault and battery against a family or household member shall be guilty of a Class 1 misdemeanor."); *Wood* v. *Commonwealth*, 140 S.E. 114, 115 (Va. 1927) ("A battery consists of the wilful or unlawful touching of the person of another by the assailant, or by some object set in motion by him.").

West Virginia: W. Va. Code Ann. § 61-2-28(a) (West 1995) ("If any family or household member unlawfully * * * makes physical contact of an insulting or provoking nature with another family or household member or unlawfully and intentionally causes physical harm to another family or household member, he or she is guilty of a misdemeanor.").

Bodily Injury Statutes:

Arkansas: Ark. Code Ann. § 5-26-305(a)(1) and (4) (West 1995) ("A person commits domestic battering in the third degree" by, *inter alia*, "purpose[ly] * * * caus[ing] physical injury to a family or household member.").

Georgia: Ga. Code Ann. § 16-5-23.1(f)(1) (West 1996) ("If the offense of battery is committed between [family or household members], then such offense shall constitute the offense of family violence battery and * * * [u]pon a first conviction of family battery, the defendant shall be guilty of and punished for a misdemeanor."); *id.* § 16-5-23.1(a) ("A person commits the offense of battery when he or she intentionally causes substantial physical harm or visible bodily harm to another.").[4]

Minnesota: Minn. Stat. Ann. § 609.2242(1)(2) (West 1996) (defining domestic assault as, *inter alia*, "intentionally inflict[ing] * * * bodily harm upon" a family or household member).

Montana: Mont. Code Ann. § 45-5-206(1)(a) (1995) ("A person commits the offense of partner or family member assault if the person," *inter alia*, "purposely or knowingly causes bodily injury to a partner or family member.").

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[4] Georgia has since amended its misdemeanor domestic violence statute to encompass simple battery committed against a family or household member. Ga. Code Ann. § 16-5-23(f) (West 2013) ("If the offense of simple battery is committed between [family and household members,] the defendant shall be punished for a misdemeanor of a high and aggravated nature."); *id.* § 16-5-23(a) ("A person commits the offense of simple battery when he or she either" "[i]ntentionally makes physical contact of an insulting or provoking nature with the person of another" or "[i]ntentionally causes physical harm to another.").

Ohio: Ohio Rev. Code Ann. § 2919.25(A) (West 1995) ("No person shall knowingly cause * * * physical harm to a family or household member.").

South Carolina: S.C. Code 1976 § 16-25-20(1) (1995) ("It is unlawful to," *inter alia*, "cause physical harm or injury to a person's own household member.").

Vermont: Vt. Stat. Ann. tit. 13, § 1042 (West 1995) ("Any person who * * * willfully * * * causes bodily injury to a family or household member" is guilty of domestic assault.).

Miscellaneous Statutes:

Hawaii: Haw. Rev. Stat. § 709-906(1) (West 1995) ("It shall be unlawful for any person * * * to physically abuse a family or household member.").

Idaho: Idaho Code Ann. § 18-918(3) (West 1995) ("An adult household member who commits a battery, as defined in section 18-903, Idaho Code, against another adult household member is guilty of domestic battery."); *id.* § 18-903 ("A battery is any" "[w]illful and unlawful use of force or violence upon the person of another" or "[a]ctual, intentional and unlawful touching or striking of another person against the will of the other" or "[u]nlawfully and intentionally causing bodily harm to an individual.").

Iowa: Iowa Code Ann. § 708.2A(1) (West 1995) ("'[D]omestic abuse assault' means an assault, as defined in section 708.1" against certain family or household members.); *id.* § 708.1 ("A person commits an assault when, without justification, the person," *inter alia*, commits "[a]ny act which is intended to cause pain or injury to, or which is intended to result in physical contact which will be insulting or offensive to another, coupled with the apparent ability to execute the act."); *id.* § 708.2A(2)(a) (Domestic abuse assault defined as simple misdemeanor.); *id.* § 708.2A(2)(b) (Domestic abuse assault is a serious misdemeanor if "committed without the intent to inflict a serious injury upon another, and the assault causes bodily injury or disabling mental illness."); *id.* § 708.2A(2)(c) (Domestic abuse assault is an aggravated misdemeanor if, *inter alia*, "committed with the intent to inflict a serious injury upon another.").

APPENDIX D

LATER ENACTED STATE DOMESTIC VIOLENCE STATUTES

Bodily Injury or Offensive Touching Statutes:

Kansas: Kan. Stat. Ann. § 21-5414(a) (West 2013) ("Domestic battery is," *inter alia*, "[k]nowingly * * * causing bodily harm by a family or household member against a family or household member" or "knowingly causing physical contact with a family or household member by a family or household member when done in a rude, insulting or angry manner.").

Louisiana: La. Rev. Stat. Ann. § 14:35.3(A) (2013) ("Domestic abuse battery is the intentional use of force or violence committed by one household member upon the person of another household member."); *State* v. *Schenck*, 513 So. 2d 1159, 1165 (La. 1987) ("An essential element of battery is 'physical contact whether injurious or merely offensive.'") (citation omitted).

Maine: Me. Rev. Stat. Ann. tit. 17-A, § 207-A(1) (2013) ("A person is guilty of domestic violence assault if" "[t]he person violates section 207 and the victim is a family or household member."); *id.* § 207 ("A person is guilty of assault if * * * [t]he person," *inter alia*, "intentionally[] [or] knowingly * * * causes bodily injury or offensive physical contact to another person.").

Missouri: Mo. Ann. Stat. § 565.074(1)(1) and (5) (West 2013) ("A person commits the crime of domestic assault in the third degree if the act involves a family or household member" and, *inter alia*, "[t]he person * * * recklessly causes physical injury to such family or household member" or "[t]he person knowingly causes physical contact with such family or household member knowing the other person will regard the contact as offensive.").

Nevada: Nev. Rev. Stat. Ann. § 33.018(1)(a) (West 2013) (defining domestic violence as, *inter alia*, "[a] battery" committed against a family or household member); *id.* § 200.485(1) (setting out penalties for domestic battery); *id.* § 200.481(1)(a) ("'Battery' means any willful and unlawful use of force or violence upon the person of another."); *Hobbs* v. *State*, 251 P.3d 177, 180 (Nev. 2011) ("[B]attery is the intentional and unwanted exertion of force upon another, however slight.").

Tennessee: Tenn. Code Ann. § 39-13-111(b) (West 2013) ("A person commits domestic assault who commits an assault as defined in [Section] 39-13-101 against" a family or household member.); *id.* § 39-13-101(a)(1) and (3) ("A person commits assault who," *inter alia*, "[i]ntentionally[] [or] knowingly * * * causes bodily injury to another" or "[i]ntentionally or knowingly causes physical contact with another and a reasonable person would regard the contact as extremely offensive or provocative.").

Bodily Injury Statutes:

Alabama: Ala. Code § 13A-6-132(a) (West 2013) ("A person commits domestic violence in the third degree if the person," *inter alia*, "commits the crime of assault in the third degree pursuant to Section 13A-66-22 * * * and the victim is a [family or household member]."); *id.* § 13A-6-22(a)(1) ("A person commits the crime of assault in the third degree if," *inter alia*, "[w]ith intent to cause physical injury to another person, he causes physical injury to any person.").

Mississippi: Miss. Code Ann. § 97-3-7(3)(a)(i) (West 2013) ("A person is guilty of simple domestic violence who," *inter alia*, "purposely[] [or] knowingly * * * causes bodily injury" to a family or household member.).

Nebraska: Neb. Rev. Stat. § 28-323(1)(a) (2013) ("A person commits the offense of domestic assault in the third degree if he or she," *inter alia*, "[i]ntentionally and knowingly causes bodily injury to his or her intimate partner.").

North Dakota: N.D. Cent. Code Ann. § 12.1-17-01(2)(b) (West 2013) (simple assault is "[a] Class B misdemeanor for the first offense when the victim is" a family or household member); *id.* § 12.1-17-01(1)(a) ("A person is guilty of [simple assault] if that person," *inter alia*, "[w]illfully causes bodily injury to another human being.").

Miscellaneous Statutes:

Indiana: Ind. Code Ann. § 35-42-2-1.3(a) (West 2013) ("A person who knowingly or intentionally touches an individual who [is a family or household member] in a rude, insolent, or angry manner that results in bodily injury to [that] person * * * commits domestic battery, a Class A misdemeanor.").

Utah: Utah Code Ann. § 77-36-1(4)(b) (West 2013) (defining domestic violence as, *inter alia*, an assault under Section 76-5-102 "by one cohabitant against another"); *id.* § 76-5-102(1)(a) ("Assault is," *inter alia*, "an act, committed with unlawful force or violence, that causes bodily injury to another or creates a substantial risk of bodily injury to another."); *id.* § 76-5-102(2) and 77-36-1.1(2)(b) (enhancing penalty for "domestic violence" assault to a class A misdemeanor).

RESPONDENT'S BRIEF

Supreme Court, U.S.
FILED
DEC 16 2013
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No. 12-1371

In the Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

JAMES ALVIN CASTLEMAN,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Section 922(g)(9) of Title 18, United States Code, makes it a crime for any person convicted of a "misdemeanor crime of domestic violence" to possess a firearm in or affecting commerce. The phrase "misdemeanor crime of domestic violence" is defined to include any federal, state, or tribal misdemeanor offense, committed by a person with a specified domestic relationship to the victim, that "has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon." 18 U.S.C. § 921(a)(33)(A). The question presented is:

Whether a "misdemeanor crime of domestic violence" within the meaning of Section 922(g)(9) is an offense that has, as an element, the use of violent force.

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BRIEF FOR RESPONDENT

STATEMENT

The government contends that a person commits a crime of "domestic violence" within the meaning of 18 U.S.C. § 922(g)(9) if he or she engages in "even the slightest offensive touching" (U.S. Br. 14), and that a person "uses physical force" within the meaning of 18 U.S.C. § 921(a)(33)(A) by (for example) tricking a victim into swallowing poison because "the forceful physical properties of the poison" operate in the victim's system at the molecular level. *Id.* at 31. These contentions are insupportable: they take no account of the plain meaning of the words "violence," "use," and "force" that Congress actually used in the statutory provisions.

The government's position also departs from the manifest congressional purpose. There is no doubt about what Congress meant to accomplish in Section 922(g)(9): its goal was to keep firearms from people who "engage in serious spousal or child abuse." 142 Cong. Rec. 22,985 (1996) (Sen. Lautenberg). Congress did *not* intend to impose a lifetime firearms ban on people who engage in "offensive touching," or who cause "a paper cut or a stubbed toe." U.S. Br. 27. But that is what the government reads the statute to accomplish.

Against this background, Tennessee's misdemeanor assault statute simply does not contain the elements necessary to make it a predicate offense for application of Section 922(g)(9). At bottom, it cannot be the case that someone who has done nothing either forceful or violent can be thought guilty of a crime of "violence" that requires the "use of physical force." If the government now believes that Congress defined the offense of "misdemeanor domestic violence" in excessively narrow terms, it is for Congress, and not the government or this Court, to change that definition.

A. Statutory Background.

The statute at issue here, 18 U.S.C. § 922(g)(9), imposes a lifetime ban on the possession of a firearm on any person "who has been convicted in any court of a misdemeanor crime of domestic violence." A "misdemeanor crime of domestic violence" is defined in relevant part to include a state-law misdemeanor committed against a person who has a specified relationship to the defendant and that "has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon." 18 U.S.C. § 921(a)(33)(A). Violators of Section 922(g)(9) are subject to a term of up to ten years' imprisonment. 18 U.S.C. § 924(a)(2).

Section 922(g)(9) is part of a broad federal scheme of firearm prohibitions, first established by the Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213, that principally prohibits felons from possessing firearms. See, *e.g.*, 18 U.S.C. § 922(g)(1). As this Court has acknowledged, the impetus for Section 922(g)(9)—commonly known as the "Lautenberg Amendment"—was Congress's sense that "[e]xisting felon-in-possession laws * * * were not keeping firearms out of the hands of domestic abusers, because 'many people who engage in serious spousal or child abuse ultimately are not charged with or convicted of felonies.'" *United States* v. *Hayes*, 555 U.S. 415, 426 (2009) (quoting 142 Cong. Rec. 22,985 (1996) (Sen. Lautenberg)). By extending the firearms ban to certain violent misdemeanors, "proponents of § 922(g)(9) sought to 'close this dangerous loophole.'" *Ibid.* (quoting 142 Cong. Rec. 22,986 (1996) (Sen. Lautenberg)).

As the measure's chief sponsor, Senator Lautenberg, noted at length:

> There is no reason for someone who beats their wives or abuses their children to own a gun. When you combine wife beaters and guns, the end result is more death.
>
> This amendment would close this dangerous loophole and keep guns away from violent individuals who threaten their own families, people who have shown that they cannot control themselves and are prone to fits of violent rage directed, unbelievably enough, against their own loved ones.

142 Cong. Rec. 22,986 (1996). Every other senator who spoke on the legislation expressed a similar intent to keep guns away from violent individuals. See, *e.g.*, 142 Cong. Rec. 19,301 (1996) (Sen. Hutchison) ("keep[ing] people who batter their wives or people with whom they live from having handguns"); *id.* at 22,987 (Sen. Wellstone) ("We are talking about citizens who have been convicted of an act of violence against a spouse or child[.]"); *id.* at 22,987-22,988 (Sens. Murray and Feinstein).

Congress drafted the statute accordingly. As originally proposed, the language referred to any "crime of domestic violence," defined in part as any "felony or misdemeanor crime of violence, regardless of length, term, or manner of punishment." 142 Cong. Rec. 5,840 (1996). But, because "[s]ome argued that the term crime of violence was too broad, and could be interpreted to include an act such as cutting up a credit card with a pair of scissors" (142 Cong.

Rec. 26,675 (1996) (Sen. Lautenberg)),[1] Congress "revise[d] the language of 921(a)(33)(A) to spell out the use-of-force requirement," replacing the "unelaborated phrase 'crime of violence,' with the phrase 'has, as an element, the use or attempted use of physical force.'" *Hayes*, 555 U.S. at 428. See 142 Cong. Rec. 26,675 (1996) (Sen. Lautenberg).

By linking its definition of a crime of domestic violence to the "use of physical force," Congress borrowed the language of existing laws that had defined the meaning of "violent" crimes across a range of statutory contexts. For example, Congress had defined a "crime of violence" generically to include, in part, "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. § 16(a).[2] Similarly, in a statute enacted in 1986, Congress defined the term "violent felony" for purposes of the Armed Career Criminal Act ("ACCA") to include, among other things, a felony that "has as an element the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. § 924(e)(2)(B)(i). In *Johnson* v. *United States*, 559 U.S. 133, 140, 142 (2010), this Court held that the term "physical force" as used in Section

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[1] Senator Lautenberg added that the revised definition "is more precise, and probably broader," insofar as "the earlier version * * * did not explicitly include within the ban crimes involving an attempt to use force, or the threatened use of a weapon, if such an attempt or threat did not also involve actual physical violence." 142 Cong. Rec. 26,675 (1996).

[2] Congress enacted this provision in 1984, and its definition of a "crime of violence" is "incorporated into a variety of statutory provisions, both criminal and noncriminal." *Leocal* v. *Ashcroft*, 543 U.S. 1, 6-7 (2004).

924(e)(2)(B)(i) means "*violent* force"—that is, "force strong enough to constitute 'power.'" And, in *Leocal* v. *Ashcroft*, 543 U.S. 1, 11 (2004), the Court similarly held that the term "crime of violence," as used in 18 U.S.C. § 16(a), "suggests a category of violent, active crimes."

B. Respondent's Predicate Conviction.

In 2001, respondent pleaded guilty to one count of misdemeanor domestic assault, in violation of Tenn. Code Ann. § 39-13-111(b). Pet. App. 1a-2a. As it read in 2001, that statute made it unlawful to "commit[] an assault as defined in § 39-13-101 against a domestic abuse victim." Under Tenn. Code Ann. § 39-13-101(a)(1), one committed assault by, among other things, "[i]ntentionally, knowingly, or recklessly caus[ing] bodily injury to another." In turn, bodily injury was defined to include "a cut, abrasion, bruise, burn or disfigurement, and physical pain or temporary illness or impairment of the function of a bodily member, organ, or mental faculty." *Id.* § 39-11-106(a)(2).

The indictment against respondent alleged that he "did intentionally or knowingly cause bodily injury" in violation of Section 39-13-111(b). JA 27.[3] The indictment did not allege that respondent caused a serious injury to the victim, that he used or attempted to use force or violence to cause injury, or, indeed, that he engaged in any physical contact with the victim at all. Rather than go to trial, respondent pleaded guilty and was sentenced to probation. JA 17. Tennessee law required that respondent be informed before his plea that it is a criminal offense for a person convicted of a crime of domestic violence to possess or purchase a firearm (see Tenn. Code Ann. § 40-14-109(b)), but respondent was not given the required warning. JA 18.

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[3] The indictment establishes that respondent was charged with causing bodily injury under Tenn. Code Ann. § 39-13-101(a)(1), rather than under the other prongs of the Tennessee assault statute, which address causing another to fear bodily injury or engaging in offensive contact. See *id.* §§ 39-13-101(a)(2) and (a)(3).

Although the indictment and plea do not reveal additional facts about respondent's specific conduct, police in Tennessee often arrest individuals for violations of the Tennessee misdemeanor assault statute that are alleged to rest on conduct involving a minimal degree of force, such as poking or shoving the victim. See, *e.g.*, Affidavit of Complaint, *State* v. *Burnett*, No. 13CR1433 (Tenn. Cnty. Ct. June 13, 2013); Affidavit of Complaint, *State* v. *Stanfill*, No. 13CR1222 (Tenn. Cnty. Ct. May 21, 2013). Occasionally, an arrest involves merely aggressive conduct, such as spitting on the victim or shaking one's fist. See, *e.g.*, Affidavit of Complaint, *State* v. *Cummings*, No. 13CR2165 (Tenn. Cnty. Ct. Sept. 9, 2013).[4] Tennessee courts have held conduct of this sort to be within the bounds of the misdemeanor assault statute. See, *e.g.*, *State* v. *Wachtel*, No. M2003-00505-CCA-R3-CD, 2004 WL 784865, at *12 (Tenn. Crim. App. Apr. 13, 2004) (scratches and bruises from swatting at victim's arms sufficient to qualify as "bodily injury").

While the present case against respondent was pending, he sought to have his Tennessee conviction for domestic assault set aside in a collateral state proceeding. See JA 17-20. He explained that he was never informed, and in fact did not know, that his guilty plea for misdemeanor domestic assault would render him ineligible to own a firearm, and that this failure to inform him of the consequences of his plea violated state law. JA 18. The state circuit court agreed and ordered respondent's conviction set aside. JA 20, 26. That decision was reversed by a divided state appellate court on the ground that respondent's collateral attack was untimely. *State* v. *Castleman*, No. W2009-01661-CCA-R3-CD, 2010 WL 2219543 (Tenn. Crim. App. May 27, 2010), cert. denied, 131 S. Ct. 2964 (2011).[5]

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[4] Respondent has sought leave to lodge these documents with the Clerk.

C. Procedural History.

1. In 2008, more than seven years after his misdemeanor plea, respondent was charged in an indictment with two counts of possession of a firearm by a person previously convicted of a misdemeanor crime of domestic violence. JA 13-16. There was no allegation that respondent had used, attempted to use, or threatened to use any of these firearms against family members.

Respondent moved to dismiss the charges on the ground that his Tennessee conviction was not a

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[5] The dissenting judge observed:

> [T]he facts of this case clearly establish that an illegal judgment of conviction was entered against the defendant and, as such, should not now stand to allow him to be convicted of the very crime that the Tennessee trial court failed to warn him of. In this case, the blatant fundamental unfairness is obvious and, in my opinion, clearly rises to the level of a due process violation.

Castleman, 2010 WL 2219543, at *5 (Williams, J.).

"misdemeanor crime of domestic violence" under Section 922(g)(9) because the Tennessee offense did not include, as an element, the use of physical force. The district court agreed and ordered the charges dismissed. Pet. App. 34a-50a. It explained that "[a]n assault statute that requires the mere causation of bodily injury does not necessarily require the 'use of physical force' for § 922(g)(9) purposes, at least where the statute may be violated through coercion or deception rather than through violent contact with the victim." *Id.* at 40a. And here, the court found that the text of the Tennessee assault statute "indicates that one may violate the statute without the 'use of physical force.' For instance, one could cause a victim to suffer bodily injury by deceiving him into drinking a poisoned beverage, without making contact of any kind, let alone violent contact, with the victim." Pet. App. 41a. Accordingly, the court concluded that conviction for violating the Tennessee statute "cannot serve as a qualifying misdemeanor crime of domestic violence under § 922(g)(9)." *Ibid.*

2. The Sixth Circuit affirmed. Pet. App. 1a-33a. The court began by noting that Section 921(a)(33)(A), which defines "misdemeanor crime of domestic violence," uses language "nearly identical" to that employed in Sections 924(e)(2)(B)(i) and 16(a), which "supports the inference that Congress intended them to capture offenses criminalizing identical degrees of force." *Id.* at 6a, 7a. That conclusion "gains strength in light of the order in which Congress adopted the statutes" because Section 921(a)(33)(A) was enacted last. *Id.* at 7a-8a. As a consequence, citing the similar views of several other courts of appeals, the court below "conclude[d] that the degree of force *Johnson* requires for a conviction under § 924(e)(2)(B)(i) is required of a misdemeanor crime of domestic violence."

Id. at 10a. Under this test, the court found that "'[m]isdemeanor crime of domestic violence' is most naturally interpreted to mean any crime requiring strong and violent physical force, which happens to be a misdemeanor." *Id.* at 12a. The court therefore rejected the government's contention that Section 922(g)(9) criminalizes all conduct establishing a common-law assault and battery offense, which may "involve[] no more than slight physical touching." *Id.* at 5a-6a.

The court then turned to the question whether, under this standard, the Tennessee domestic assault statute "categorically qualifies as a misdemeanor crime of domestic violence"—that is, whether establishing the elements of the state offense *necessarily* would show that the defendant committed the federal crime. Pet. App. 15a. On this, the court found that "an individual can cause an unspecified bodily injury with nonviolent physical force." *Id.* at 18a. Respondent therefore "may have been convicted for causing a minor, nonserious physical injury, in which he caused * * * bodily harm, but did so using less than strong physical force." *Id.* at 19a. The possibility that respondent used nonviolent force, in the majority's view, placed him outside the reach of Section 922(g)(9).

Judge Moore filed a concurring opinion. Pet. App. 21a-23a. She agreed that "the force requirement for a misdemeanor crime of domestic violence is identical to that specified under the crime-of-violence statute [Section 16] and [Section 924(e)(2)(B)(i)]." *Id.* at 21a. And, under this definition, "it is not enough to look only at the *result* of the defendant's conduct; instead, the focus must be on the nature of the force proscribed by the statute and whether the *conduct itself* necessarily involves violent force." *Id.* at 22a. Under this inquiry, the Tennessee assault statute does not create a "misdemeanor crime of domestic violence." *Id.* at 23a.

Judge McKeague dissented. Pet. App. 23a-33a. In his view, the "violent felony" and "misdemeanor crime of domestic violence" standards are not identical. *Id.* at 26a. And he believed that "knowingly or intentionally causing bodily injury necessitates use of physical force." *Id.* at 30a.

SUMMARY OF ARGUMENT

A. The government is wrong in contending that the misdemeanor crime of domestic violence described by 18 U.S.C. § 922(g)(9) is equivalent to common-law assault and battery, which may be established by the slightest offensive touching. Congress defined the crime as an offense that requires the exercise of "physical force," a term that connotes a significant degree of power. And it classified the crime as one of "violence," a word that suggests extreme and severe force. These words define a crime that is much narrower, and more violent and damaging, than common-law battery. That point is confirmed by decisions of this Court, which repeatedly have interpreted virtually identical statutory definitions to require the exercise of violent force. And it is emphasized by the statutory background, which shows that Congress aimed Section 922(g)(9) at persons who engaged in serious acts of violence.

It is no answer to say, as does the government, that Section 922(g)(9) refers to a misdemeanor rather than a felony. Historically, misdemeanors are differentiated from felonies not by the nature of the conduct involved, but by the length of the sentence imposed for engaging in that conduct. Indeed, Congress enacted Section 922(g)(9) precisely because many people who engaged in conduct that could have supported a felony charge were, in the domestic context, charged instead with a misdemeanor.

B. The government also is incorrect in contending that *any* force producing *any* degree of pain or physical injury necessarily is violent physical force that supports conviction under Section 922(g)(9). An act causing a paper cut or a stubbed toe, although doubtless painful and producing bodily injury—and although sufficient to support a conviction under the Tennessee misdemeanor assault statute—cannot, in ordinary usage, be regarded as an act of "violence." The government's contrary reading would produce "a comical misfit" between the defendant's conduct and the crime of conviction. *Johnson*, 559 U.S. at 145. Any doubt on this score should be resolved by application of the rule of lenity, which applies with particular force in circumstances where the statutory language did not give respondent fair warning that he was committing an offense.

C. In addition, 18 U.S.C. § 921(a)(33)(A) requires more than conduct that results in an injury; it requires "use" of physical force. This Court has held that the word "use," in a criminal statute, mandates that the defendant actively have employed the thing used, which in this context means that the defendant's conduct must *itself* have employed violent force. No such showing was, or had to have been, made in this case. The government's contrary argument—that every injury, no matter how it is produced, necessarily involves the use of force—would read the "use" requirement out of the statute entirely.

D. The government's practical enforcement concerns cannot save its reading of Section 922(g)(9). Although the government argues that reading the statute according to its plain terms would have rendered Section 922(g)(9) a virtual nullity from the date of enactment because most state assault statutes at that time included neither violent force nor the use of force as an element, Congress in 1996 may well have believed that the particular facts of a defendant's offense could be considered in determining whether Section 922(g)(9) applied. Moreover, the government's current enforcement concerns are overstated because a substantial majority of the States themselves prohibit firearms possession by people who have committed misdemeanor crimes of domestic violence, because some States have enacted domestic assault statutes that require use of violent force, and because others may do so. And however that may be, practical considerations cannot justify disregard for the plain terms of a criminal statute.

ARGUMENT

When Congress addressed the serious national problem of domestic violence, it did so by acting to keep firearms from people who had committed a specified "crime of domestic violence" that has a particular defined element: the "use of physical force." But the government's reading of the statute in this case disregards the plain and ordinary meaning of each of these terms. That reading would apply the firearms ban—and its associated 10-year prison term—to people who were not violent, whose acts were not forceful, and who did not "use" force at all. The Court should reject this approach, which "would make hash out of the effort to distinguish ordinary crimes from violent ones." *Flores* v. *Ashcroft*, 350 F.3d 666, 670 (7th Cir. 2003).

A. A Crime Of Domestic Violence Must Include, As An Element, The Use Of Violent Force.

The government's principal contention is that "'[v]iolent' physical force is not required for a conviction to qualify as a 'misdemeanor crime of domestic violence'"; instead, in the government's view, a crime involves the requisite physical force so long as it "include[s] 'even the slightest offensive touching.'" U.S. Br. 12, 14. That is so, the government continues, because Congress meant Section 922(g)(9) to have the same definition as common-law assault and battery. U.S. Br. 13-16. The government thus postulates that a defendant may be guilty of a crime of violence without ever committing a violent act. That approach cannot be reconciled with the plain statutory language and Congress's manifest purpose.

1. The ordinary meaning of "physical force" indicates that a crime must involve violence to qualify as a misdemeanor crime of domestic violence.

a. The crime created by Section 922(g)(9) is that of "domestic violence," defined in relevant part as an offense that "has, as an element, the use or attempted use of physical force." 18 U.S.C. § 921(a)(33)(A). The government's contention that this offense is committed by the slightest "offensive touch" disregards the plain meaning of each of the controlling statutory terms. U.S. Br. 14.

First, the government takes no account of the ordinary meaning of the word "force." In *Johnson*, the Court addressed 18 U.S.C. § 924(e), which in relevant part defines the term "violent felony"—in terms virtually identical to those used in 18 U.S.C. § 921(a)(33)(A)—as an offense that "has as an element the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. § 924(e)(2)(B). The Court explained that, in "general usage," the word "force" suggests "a degree of power that would not be satisfied by the merest touching." *Johnson*, 559 U.S. at 138-139. See also *id.* at 142 ("the term 'physical force' itself normally connotes force strong enough to constitute 'power'"). The Court thus noted at some length that force means "[s]trength or energy; active power; vigor; often an unusual degree of strength or energy"; "[p]ower to affect strongly in physical relations"; or "[p]ower, violence, compulsion, or constraint exerted upon a person." *Id.* at 138-139 (quoting Webster's New International Dictionary 985 (2d ed. 1934)).

Black's Law Dictionary similarly defines "force" as "[p]ower, violence, or pressure directed against a person or thing" and "physical force" as "[f]orce consisting in a physical act, esp. a violent act directed against a robbery victim." *Johnson*, 559 U.S. at 139 (quoting Black's Law Dictionary 717 (9th ed. 2009)). Prior editions of Black's, including the edition that "was current at the time the Lautenberg Amendment was passed," likewise emphasized that "force" requires a violent act. John M. Skakun III, *Violence and Contact: Interpreting "Physical Force" in the Lautenberg Amendment*, 75 U. Chi. L. Rev. 1833, 1846 (2008).[6] All of these definitions recognize that "force" implies strong or violent action.

Second, it is significant that the word "force" is used in the statute to define the term "crime of violence"; "an unclear definitional phrase may take meaning from the term to be defined." *United States* v. *Stevens*, 559 U.S. 460, 474 (2010). And a "violent" action ordinarily is understood to be one that involves "great force" or that is "[m]arked by intensity." The American Heritage Dictionary 1994 (3d ed. 1992). Dictionaries contemporary with the passage of Section 922(g)(9) emphasized that violent acts entail "extreme and sudden * * * force" (Black's Law Dictionary 1570 (6th ed. 1990)) that is "intense, vehement, very strong or severe" and "done or performed with intense or unusual force" "in order to injure, control, or intimidate others." XIX The Oxford English Dictionary 655-656 (2d ed. 1989). See also III Webster's New International Dictionary 2846 (2d ed. 1946) (violence characterized as "[s]trength or energy actively displayed" through "vehement or forcible action"). These definitions comport with the kind of offenses typically treated as "violent" crimes: "[c]rimes characterized by extreme physical force such as murder, forcible rape, and assault and battery by means of a dangerous weapon." Black's Law Dictionary 1570 (6th ed. 1990).

Third, the remainder of Section 921(a)(33)(A) supports the conclusion that "physical force" as used in this context means violent force. Thus, the provision criminalizes not only "the use or attempted use of physical force," but also "the threatened use of a deadly weapon." A deadly weapon is one "capable of producing death or serious bodily injury" (Black's Law Dictionary 398 (6th ed. 1990)), and threatening the use of a deadly weapon is "a gravely serious threat to apply physical force." *United States* v. *Belless*, 338 F.3d 1063, 1068 (9th Cir. 2003). The phrase's proximity to the "use or attempted use of physical force" indicates that both were intended to capture similarly serious and violent offenses: "a word is given more precise content by the neighboring words with which it is associated." *Freeman* v. *Quicken Loans, Inc.*, 132 S. Ct. 2034, 2042 (2012) (quoting *United States* v. *Williams*, 553 U.S. 285, 294 (2008)).

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[6] Thus, the sixth edition defined physical force as "force applied to the body; actual violence." *Black's Law Dictionary* 1147 (6th ed. 1990).

b. The government nevertheless insists that Section 922(g)(9) adopts the "specialized legal usage" of the term "force" that "comes from common-law battery," and that, viewed from this perspective, "nothing is incongruous" about a reading that categorizes rude touching as a "crime of domestic violence." U.S. Br. 14, 18. But in defining the statutory crime as it did, Congress identified a class of criminal conduct much narrower than that covered by the common-law definition of battery, which requires proof neither of violence nor of physical injury.

As the government correctly notes, at common law battery was defined as the "application of unlawful force against the person of another," and "force" in this specialized context covered "even the slightest offensive touching." U.S. Br. 14 (quoting 2 Wayne R. LaFave, *Substantive Criminal Law* § 16.2, at 552 (2d ed. 2003), and *Johnson*, 559 U.S. at 139). "[S]o jealous of the sanctity of the person" was the common law that even "the slightest touching of another, or of his clothes, or cane, or anything else attached to his person, if done in a rude, insolent, or angry manner, constitutes a battery for which the law affords redress." *Crosswhite* v. *Barnes*, 124 S.E. 242, 244 (Va. 1924); see, *e.g.*, *United States* v. *Lewellyn*, 481 F.3d 695, 698 (9th Cir. 2007).

In *Johnson*, however, the Court warned against "forc[ing] term-of-art definitions into contexts where they plainly do not fit and produce nonsense." 559 U.S. at 139-140 (quoting *Gonzales* v. *Oregon*, 546 U.S. 243, 282 (2006) (Scalia, J., dissenting)). Section 921(a)(33)(A) presents just such a context. Although the government would read the crime defined in that provision as identical to the nonviolent common-law crime of battery, what the Court said of the definition of "violent felony" in *Johnson* is just as true here: "there is no reason to define [misdemeanor crime of domestic violence] by reference to a *nonviolent* misdemeanor." 559 U.S. at 142 (emphasis added). As the Sixth Circuit noted, Congress could have targeted Section 922(g)(9) at any "misdemeanor domestic assault or battery offense" and simply grafted the common-law definition of battery into federal law. Pet. App. 12a. But it did not. Instead, Congress defined a "misdemeanor crime of domestic violence," echoing language and a statutory definition it had used to identify the other violent offenses addressed in 18 U.S.C. § 924(e)(2)(B)(i) and 18 U.S.C. § 16(a). It thus narrowed the field of eligible battery offenses, singling out a particularly malign class of crimes: those that have, "as an element, the use or attempted use of physical force."[7]

2. *The "physical force" requirement of Section 921(a)(33)(A) should have the same meaning that Congress intended when using the same term in prior statutes.*

a. As the preceding discussion suggests, the Court already has rejected the government's contention in reading statutes that use terminology almost identical to that of Section 921(a)(33)(A). As we have noted, in *Johnson* the Court addressed the meaning of 18 U.S.C. § 924(e)(2)(B), which in relevant part defines the term "violent felony" as an offense that "has as an element the use, attempted use, or threatened use of physical force against the person of another." *Id.* § 924(e)(2)(B)(i). Although the Court recognized that the common-law definition of battery was "satisfied by even the slightest offensive touching," it reasoned that "[h]ere we are interpreting the phrase 'physical force' as used in defining not the crime of battery, but rather the statutory category of 'violent felon[ies].'" 559 U.S. at 139, 140. The Court "th[ought] it clear that in the context of a statutory definition of '*violent* felony,' the phrase 'physical force' means *violent* force—that is, force capable of causing physical pain or injury to another person." *Id.* at 140. Similarly, in *Leocal*, the Court understood 18 U.S.C. § 16(a)'s definition of "crime of violence"—"an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another"—as "suggest[ing] a category of violent, active crimes." 543 U.S. at 11.

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[7] The government minimizes the significance of the term "violence," asserting: "Congress could have just as easily chosen to prohibit the possession of firearms by those convicted of 'misdemeanor crime[s] of domestic abuse.' Placing undue emphasis on the word 'violence' in isolation ignores that larger statutory context." U.S. Br. 19. But "abuse" and "violence" are not synonyms. Indeed, some state statutes define "domestic abuse" and "domestic violence" as separate offenses, with the former covering a much broader range of conduct than the latter. See, *e.g.*, Colo. Rev. Stat. Ann. § 13-14-101(2) (West 2013) (defining "domestic abuse" as "any act, attempted act, or threatened act of violence, stalking, harassment, or coercion"); Colo. Rev. Stat. Ann. § 18-6-800.3(1) (West 2013) (defining "domestic violence" as "an act or threatened act of violence upon a person with whom the actor is or has been involved in an intimate relationship"). Other federal statutes, like Section 922(g)(9), focus specifically on definitions of "domestic violence." See, *e.g.*, 8 U.S.C. § 1227(a)(2)(E)(i) (defining domestic violence as "any crime of violence (as defined in section 16 of Title 18) against a person committed by a current or former spouse" or with other specified domestic relationships); 42 U.S.C. § 13925(a)(8) (defining domestic violence as "includ[ing] felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner of the victim" or with other specified domestic relationships).

As the court below noted, "§ 921(a)(33)(A)(ii) drops the reference to 'threatened use' from §§ 16(a) and 924(e)(2)(B)(i) but otherwise tracks the language of §§ 16(a) and 924(e)(2)(B)(i)." Pet. App. 7a. Accordingly, "[t]he provisions' similarity supports the inference that Congress intended them to capture offenses criminalizing identical degrees of force." *Ibid.* This reading is bolstered by "the order in which Congress adopted the statutes," which suggests that Congress intentionally modeled Section 921(a)(33)(A)(ii) after Section 924(e)(2)(B)(i) and aimed to cover the same range of conduct. *Ibid.*

This reasoning surely is correct. It is fundamental that enactments like these, which use virtually identical language in closely related statutory sections that have similar purposes, "should not be read as a series of unrelated and isolated provisions." *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 570 (1995). Instead, "when Congress uses the same language in two statutes having similar purposes * * * it is appropriate to presume that Congress intended that text to have the same meaning in both statutes." *Smith* v. *City of Jackson, Miss.*, 544 U.S. 228, 233 (2005) (plurality opinion). And "[t]he burden should be on the proponents of the view" that the same term means different things in different places "to adduce strong textual support for that conclusion." *Gustafson*, 513 U.S. at 573. The government has not carried that burden here.

Indeed, Section 921(a)(33)(A) is more *narrowly* drawn than both Section 924(e)(2)(B) and Section 16(a). Unlike the latter two statutes, Section 921(a)(33)(A) does not extend in general to any threatened use of physical force; it applies only to the more serious situation of threatened use of a deadly weapon. And, unlike the latter two statutes, Section 921(a)(33)(A) does *not* include an alternative and broader definition of violence beyond a use-of-physical-force requirement.[8] These differences are consistent with Congress's intent to carefully delimit the class of misdemeanor violators subject to a lifetime ban on possessing firearms.

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[8] See 18 U.S.C. § 924(e)(2)(B)(ii) (alternative definition of "violent felony" to include felony that "is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another"); 18 U.S.C. § 16(b) (alternative definition of "crime of violence" to include "any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense").

b. To be sure, as the government notes (U.S. Br. 16), the Court in *Johnson* left open the question whether the words "physical force" should be interpreted identically in Sections 924(e)(2)(B)(i) and 921(a)(33)(A)(ii). See 559 U.S. at 143-144. But the analysis used in *Johnson* has obvious relevance here: the operative language of the two provisions ("the use or attempted use of physical force") is identical; the Court in *Johnson* focused on the general definition of the word "force"; and both provisions address crimes of violence ("violent felony" and "misdemeanor crime of domestic violence"), which in each case has a "clear[]" "connotation of strong physical force." *Id.* at 140. Here, as in *Johnson*, the Court is considering "the phrase 'physical force' as used in defining not the crime of battery, but rather [a] statutory category of" offense with specific elements. *Ibid.* And, although the government would read Section 921(a)(33)(A) as identical to the *nonviolent* common-law crime of battery because the statute addresses predicate misdemeanors rather than felonies (see U.S. Br. 17-19), that contention does not answer the obvious point that "there is no reason to define [misdemeanor crime of domestic *violence*] by reference to a *nonviolent* misdemeanor." *Johnson*, 559 U.S. at 142 (emphasis added).

Moreover, the government's distinction between misdemeanors and felonies (U.S. Br. 17-19) fails on its own terms. The misdemeanor-felony distinction depends on the *punishment* applied to a given crime—not the *nature* of the crime itself. Thus, "most criminal statutes defining specific crimes do not themselves label as felonies or misdemeanors the crimes which they describe, leaving the matter to be determined by reference to the punishment provided (according to the place or to the length of confinement)." Wayne R. LaFave, *Criminal Law* § 1.6, at 37 (5th ed. 2010) (citing *State* v. *Wolford Corp.*, 689 N.W.2d 471 (Iowa 2004)). Congress emphasized this point by using nearly identical language to define "misdemeanor crime of domestic violence" and "violent felony"—indicating that both phrases cover the same type of conduct, even if different penalties are applied to that conduct. This should come as no surprise to the government, which acknowledged at oral argument in *Johnson* that "the misdemeanor versus felony distinction is somewhat unimportant to the interpretation of the 'use of physical force' language" because "the same language was deployed first in the 'crime of violence' definition of 18 U.S.C. 16, which by its terms, applies to both misdemeanors and felonies." Tr. of Oral Arg. at 39, *Johnson*, 559 U.S. 133.

3. *The statutory background of Section 922(g)(9) confirms that Congress intended the statute to reach only violent offenders.*

The statutory background confirms Congress's intent to use Section 921(a)(33)(A) to reach violent conduct similar to that addressed by Section 924(e)(2)(B)(i) that happened to be charged as a misdemeanor rather than a felony. At the time of Section 922(g)(9)'s enactment, federal law barred felons from possessing firearms. But Senator Lautenberg explained that the amendment was needed because "many people who engage in serious spousal or child abuse ultimately are not charged with or convicted of felonies. At the end of the day, due to outdated laws or thinking, perhaps after a plea bargain, they are, at most, convicted of a misdemeanor." 142 Cong. Rec.

22,985 (1996).[9] By expanding the ban on firearms possession to specified misdemeanants, Congress sought to "close this dangerous loophole and keep guns away from violent individuals" (142 Cong. Rec. 22,985 (1996) (Sen. Lautenberg))—and not to reach a broader range of conduct.

Other senators uniformly echoed this purpose, emphasizing that Congress was concerned specifically with serious and violent conduct. See 142 Cong. Rec. 19,301 (1996) (Sen. Hutchison) ("Because of Senator Lautenberg's amendment, we are also going to be able to keep people who batter their wives or people with whom they live from having handguns."); *id.* at 22,986 (1996) (Sen. Wellstone) ("[I]f you beat up or batter your neighbor's wife, it is a felony. If you beat up or batter, brutalize your own wife or your own child, it is a misdemeanor."); *id.* at 22,988 (Sen. Feinstein) ("plea bargains often result in misdemeanor convictions for what are really felony crimes," permitting "perpetrators of severe and recurring domestic violence" to possess a gun).

That the ultimate language of Section 922(g)(9) was the product of a legislative compromise strengthens this view. The House passed the Lautenberg Amendment the very day that the language of the provision was amended to incorporate the use-of-force requirement. 142 Cong. Rec. 26,675 (1996). According to Senator Lautenberg, the language was a direct response to opponents who worried that "the term crime of violence was too broad." *Ibid.* The "use of force" element therefore was intended to narrow the scope of the statute to convictions based on especially severe conduct.[10] This Court has frequently reiterated that "[c]ourts and agencies must respect and give effect to these sorts of compromises." *Ragsdale* v. *Wolverine World Wide, Inc.*, 535 U.S. 81, 94 (2002). That principle requires adopting a narrow interpretation of physical force.

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[9] Senator Lautenberg's statements, "as those of the sponsor of the language ultimately enacted, are an authoritative guide to the statute's construction." *N. Haven Bd. of Educ.* v. *Bell*, 456 U.S. 512, 526-527 (1982).

The government's only response to this history is its reliance on several stray references by Senator Lautenberg to "assault," which it takes to mean that the drafters of Section 922(g)(9) had in mind common-law assault and battery. U.S. Br. 44-45. But, in context, it is plain that none of these brief and colloquial references were meant to minimize the nature of the qualifying conduct. See, *e.g.*, U.S. Br. 45 ("Assault your ex-wife, lose your gun"). The government also invokes the parenthetical observation of the Bureau of Alcohol, Tobacco, and Firearms (ATF) that Section 922(g)(9) reaches "assault and battery." U.S. Br. 45 (citing *Implementation of Public Law 104208, Omnibus Consolidated Appropriations Act of 1997*, 63 Fed. Reg. 35,520, 35,521 (June 30, 1998)). But the ATF did not indicate how it arrived at this conclusion or explain how its interpretation is consistent with Congress's intent. And although the government suggests that Congress acquiesced in the ATF statement, there is no evidence that Congress was aware of, let alone that it meant to endorse, that statement. The Court has "sometimes relied on congressional acquiescence [to an agency interpretation] when there is evidence that Congress considered and rejected the 'precise issue' presented before the Court," but, "absent such overwhelming evidence of acquiescence," it is "loath to replace the plain text and original understanding of a statute with an amended agency interpretation." *Rapanos* v. *United States*, 547 U.S. 715, 750 (2006) (plurality opinion) (internal quotations, brackets, and citations omitted).

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[10] The government previously has acknowledged that this compromise was intended to limit qualifying predicate offenses to those involving violence:

> Respondent cites some Members' concerns about the statute's "breadth," but those concerns were that the statute might be applied to acts that were not sufficiently violent to justify prohibiting firearm possession, not that the statute might be applied to offenses that lacked a domestic-relationship element.

Reply Brief for the United States at 18, *Hayes*, 555 U.S. 415 (2009) (No. 07-608) (citations omitted).

4. Not all bodily injury is the product of violent force.

a. As a fallback, the government maintains that, if violent force is required for conviction under Section 922(g)(9), *any* force that produces *any* pain or bodily injury necessarily satisfies that standard. U.S. Br. 23-24. Although the nature of the government's proposed standard is in some respects opaque, it does not deny that its construction would find the requisite violent force present even when the defendant caused "a paper cut or a stubbed toe." U.S. Br. 23 (quoting Pet. App. 16a-17a). If that is the government's position, it is incorrect: violent force "connotes a substantial degree of force" (*Johnson*, 559 U.S. at 140) of the sort that could produce "serious physical injury." Pet. App. 17a.

Section 922(g)(9) creates a crime of "violence," and, as we have explained, a "violent" action ordinarily is understood to be one that involves "great force."

The American Heritage Dictionary 1994 (3d ed. 1992). An act that inflicts a stubbed toe or a paper cut doubtless causes pain and bodily injury—and thus satisfies the government's test—but describing such an act as a "crime of violence" would, in ordinary usage, be "a comical misfit." *Johnson*, 559 U.S. at 145. Moreover, as we also have explained, Congress meant exactly what it said in the statutory text when it used the word "violence": it directed Section 922(g)(9) at the "wife beaters and child abusers" (142 Cong. Rec. 19,415 (1996) (Sen. Lautenberg)) who were "perpetrators of severe and recurring domestic violence." *Id.* at 22,988 (Sen. Feinstein). Beating a domestic partner is a crime of violence; causing a paper cut is not.

Thus, as Judge Easterbrook emphasized for the Seventh Circuit, when "[a] paper airplane inflicts a paper cut, the snowball causes a yelp of pain, or a squeeze of the arm causes a bruise, the aggressor has" engaged in an act that results in bodily injury, but it "is hard to describe any of this conduct as 'violence.'" *Flores* v. *Ashcroft*, 350 F.3d 666, 670 (7th Cir. 2003). The line between violence and an action that is less severe "is not a quantitative line * * * but a qualitative one" (*id.* at 672), and understanding a paper cut to be a "violent crime" "would make hash out of the effort to distinguish ordinary crimes from violent ones." *Ibid.*

b. This understanding is confirmed by the meaning of the phrase "use of physical force" as it appeared in the ACCA, the immediate antecedent to Section 922(g)(9). That statute initially applied only to persons who had been convicted of burglary or robbery. See Armed Career Criminal Act of 1984, Pub. L. No. 98-473, §§ 1801-1803, 98 Stat. 2185,

2185. It subsequently was expanded to reach persons who committed a "violent felony," defined as any crime punishable by imprisonment for more than a year that (i) "has as an element the use, attempted use, or threatened use of physical force against the person of another" or (ii) "is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. §§ 924(e)(2)-(B)(i), (ii). These provisions target "armed, habitual drug traffickers and violent criminals" (H.R. Rep. No. 99-849, at 1 (1986)), who tend to commit serious offenses like "homicides," "rapes," "robberies," and "aggravated assaults." *Id.* at 2.[11] These are "offenses of a certain level of seriousness that involve violence or an inherent risk thereof." *Taylor* v. *United States*, 495 U.S. 575, 590 (1990). They manifestly are not offenses that are characterized by *de minimis* injury.

Accordingly, the use of virtually identical language in Section 921(a)(33)(A) to require the "use of physical force" in connection with a crime of domestic violence is best read as addressing offenses of similar severity. Congress could have changed this formulation to address a broader and less serious range of offenses, but it did not.

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[11] Congress viewed robbery and burglary, the focus of the earliest iteration of the ACCA, as among "the most common violent street crimes." *Taylor* v. *United States*, 495 U.S. 575, 581 (1990) (quoting S. Rep. No. 98-190, at 5 (1983)). The 1986 Amendments, which included Section 924(e)(2)(B), maintain this focus on street crime while expanding the scope of the original act to all violent felonies.

5. *The government's argument is inconsistent with the rule of lenity.*

Finally, we of course submit that our reading of Section 922(g)(9) is compelled by the plain statutory text. But if there is any doubt on that score, the government's contrary approach—under which people who engage in conduct that would be thought nonviolent in every ordinary sense are deemed guilty of a "crime of domestic violence," subjecting them to a lengthy prison term if they engage in the otherwise lawful act of acquiring a firearm—must be thought to rest on language that is (from the government's perspective) no better than ambiguous. In these circumstances, "[t]his is a textbook case for application of the rule of lenity." *Hayes*, 555 U.S. at 436 (Roberts, C.J., dissenting). See *McNally* v. *United States*, 483 U.S. 350, 359-360 (1987) ("[W]hen there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language.").

Although it may be commonly understood that *violent* offenders are not permitted to purchase or own firearms, individuals are very unlikely to be aware that *nonviolent* action causing minor (or no) injury bars them from exercising their right to own a gun. The "construction of a criminal statute must be guided by the need for fair warning" (*Hayes*, 555 U.S. at 436 (Roberts, C.J., dissenting) (quoting *Crandon* v. *United States*, 494 U.S. 152, 160 (1990))), and the government's construction of Section 922(g)(9) would not provide such a warning in circumstances like those here.

And lack of fair warning is, in fact, just what occurred in the present case. Respondent was never informed, and did not know, that his guilty plea for misdemeanor domestic assault would render him ineligible to own a firearm. See JA 20. There is no reason he would have been aware that he was subject to the ban; "[i]t cannot fairly be said here that the text [of Section 922(g)(9)] 'clearly warrants' the counterintuitive conclusion that a 'crime of domestic violence' need not have * * * *violence* as an element." *Hayes*, 555 U.S. at 436-437 (Roberts, C.J., dissenting) (emphasis added). In these circumstances, it should not be lightly presumed that Congress intended to expose unsuspecting gun purchasers to a ten-year prison term, "especially given that there is nothing wrong with the conduct punished—possessing a firearm—if the prior misdemeanor is not covered by the statute." *Id.* at 437. "If the rule of lenity means anything" (*ibid.*), it compels the conclusion that Section 921(a)(33)(A) requires the use of violent force, a reading that may give defendants the necessary notice that they could be subject to application of the statute.

That consideration applies with particular force here. The Tennessee legislature evidently recognized that persons who plead to a misdemeanor are unlikely to be aware that they become subject to the reach of Section 922(g)(9). It therefore specifically required that, before a court "accepts the guilty plea of a defendant charged with a domestic violence offense, it shall inform the defendant" that "the defendant will never again be able to lawfully possess or buy a firearm of any kind." Tenn. Code Ann. § 40-14-109(b). But respondent received no such warning. Exposing him to federal prosecution now, many years later, raises substantial concerns that the prosecution does not comport with the notice requirements of due process. Cf. *Padilla* v. *Kentucky*, 559 U.S. 356 (2010) (failure to notify pleading defendant of significant consequences of the plea is inconsistent with Sixth Amendment requirements).

Moreover, the conduct that triggers the penalty here (possession of a firearm) itself involves a constitutionally protected interest. Although "an individual right to keep and bear arms" is conferred by the Second Amendment (*District of Columbia* v. *Heller*, 554 U.S. 570, 595 (2008)), Section 922(g)(9) "amounts to a 'total prohibition' on firearm possession for a class of individuals—in fact, a 'lifetime ban.'" *United States* v. *Chovan*, 735 F.3d 1127, 1138 (9th Cir. 2013). Reading Section 921(a)(33)(A) to require violent force "keeps § 922(g)(9)'s prohibitory sweep narrow" and assures a "reasonable fit" between the provision and the government's substantial interest in preventing domestic violence. *United States* v. *Staten*, 666 F.3d 154, 163 (4th Cir. 2011), cert. denied, 132 S. Ct. 1937 (2012). See *Chovan*, 735 F.3d at 1140; *United States* v. *Skoien*, 614 F.3d 638, 642 (7th Cir. 2010).

6. *The use of physical force is not an element of Tennessee's misdemeanor assault statute.*

a. The conclusion that a state offense is a crime of domestic violence within the meaning of Section 922(g)(9) only if it has, as an element, the use of violent force, is fatal to the government's position. Here, Tennessee's code defines "bodily injury" as "a cut, abrasion, bruise, burn or disfigurement, and physical pain or temporary illness or impairment of the function of a bodily member, organ, or mental faculty." Tenn. Code Ann. § 39-11-106(a)(2). There is no serious dispute that an act causing the slightest pain or physical injury violates this statute: as the court below recognized, "the statute does not require proof of a serious physical injury." Pet. App. 17a; see *id.* at 18a-19a. Respondent "could have caused a slight, nonserious physical injury with conduct that cannot be described as violent. [He] may have been convicted for causing a minor injury such as a paper cut or a stubbed toe." *Id.* at 17a. And "[a] defendant * * * need not necessarily use '*violent*' and 'strong physical force' to cause a cut, an abrasion, or a bruise" (*id.* at 19a (quoting *Johnson,* 559 U.S. at 140))—although the infliction of such injuries does support conviction under the Tennessee assault statute.

In this setting, use of violent force is not an element of Tennessee's misdemeanor assault statute. "Elements of a crime must be charged in an indictment and proved to a jury beyond a reasonable doubt." *United States* v. *O'Brien,* 560 U.S. 218, 224 (2010). An "element" thus is a "factual predicate[] of an offense that [is] specified by law and *must* be proved to secure a conviction." Office of Legal Counsel, U.S. Dep't of Justice, *When a Prior Conviction Qualifies as a "Misdemeanor Crime of Domestic Violence,"* at *2 (May 17, 2007), 2007 WL 3125588 ("OLC Memo") (citing *Patterson* v. *New York,* 432 U.S. 197, 210 (1977); *Richardson* v. *United States,* 526 U.S. 813, 817 (1999); Black's Law Dictionary 538 (7th ed. 1999) (emphasis added)). As the Office of Legal Counsel recognized in a memorandum on the very question at issue here, "[i]f conviction of a given offense can be secured without proof of a certain fact, then that fact is not an element of that offense." OLC Memo at *3. That "element" principle disposes of this case: if it is *possible* to commit the state-law misdemeanor of causing bodily injury to another without "using physical force," that offense necessarily cannot have, "*as an element*, the use or attempted use of physical force."

b. In response, the government does not dispute that causing a paper cut would constitute assault under the Tennessee statute. Instead, pointing to *Gonzales* v. *Duenas-Alvarez*, 549 U.S. 183 (2007), and *Moncrieffe* v. *Holder*, 133 S. Ct. 1678 (2013), the government declares it beside the point that a defendant *could* be convicted under the Tennessee statute even if he or she did not use force (or violent force). U.S. Br. 25-26. In its view, "fanciful hypotheticals" are not enough to establish that the state law could be used to prosecute a nonviolent act; the government submits that there must be a "'realistic probability,' and not just a 'theoretical possibility,' that the state statute would be applied" in such a manner. U.S. Br. 25. This argument, however, is unavailing for two reasons.

First, although the record in this case reveals nothing about the acts actually leading to respondent's misdemeanor conviction, prosecutions for conduct including nonviolent domestic assault are *not* hypothetical in Tennessee. See *State* v. *Wachtel*, No. M2003-00505-CCA-R3-CD, 2004 WL 784865, at *12 (Tenn. Crim. App. 2004) (defendant "tried to slap his hands at [the victim's] arms to keep them away from him," causing "some scratches and bruises"). And individuals are not infrequently arrested in assault cases for less severe conduct. See Affidavit of Complaint, *State* v. *Stanfill*, No. 13CR1222 (Tenn. Cnty. Ct. May 21, 2013) (defendant arrested for domestic assault for "poking his finger on [the victim's] face several times," causing "red marks and a scratch on her face."); Affidavit of Complaint, *State* v. *Cummings*, No. 13CR2165 (Tenn. Cnty. Ct. Sept. 9, 2013) (man "raised his fist at" his girlfriend and "[spat] on her"); Affidavit of Complaint, *State* v. *Burnett*, No. 13CR1433 (Tenn. Cnty. Ct. June 13, 2013) (woman "pushed" a man). Because prosecutions for nonviolent domestic assault have taken place, convictions under Tennessee's bodily-injury statute cannot categorically qualify as misdemeanor crimes of domestic violence even on the government's view of the law.[12] And, of course, most cases involving less serious conduct are disposed of by plea, and therefore do not produce reported decisions.

Second, and in any event, Section 921(a)(33)(A)'s specification of the use of physical force as a required "element" of the offense means that the government's authorities are not on point. In both *Duenas-Alvarez* and *Moncrieffe*, the Court considered whether a state crime was substantially different from a "generic" crime referenced in a federal statute. In *Duenas-Alvarez*, the Court addressed whether a California conviction for "aiding and abetting" a theft offense qualified as a "theft offense" under a federal statute. 549 U.S. at 185. Because the federal law did not list the specific elements of the crime, the Court inquired into "the generic sense in which the term ['theft offense'] is now used in the criminal codes of most States." *Id.* at 186 (quoting *Taylor*, 495 U.S. at 598). The defendant argued that California's definition of "theft offense" deviated from this generic definition, because California law held aiders and abettors liable "for any crime that 'naturally and probably' result[ed] from [their] intended crime." *Id.* at 190

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[12] Such prosecutions also occur in other jurisdictions. See, *e.g.*, *United States* v. *Smith*, 812 F.2d 161, 164 (4th Cir. 1987) (grabbing a person's wrist and arm); *United States* v. *Patch*, 114 F.3d 131, 133 (9th Cir. 1997) (pushing someone in an attempt to break free from the person's hold); *United States* v. *Lewellyn*, 481 F.3d 695, 696 (9th Cir. 2007) (spitting in a person's face).

(quoting *People* v. *Durham*, 449 P.2d 198, 204 (Cal. 1969)).

Because "many States and the Federal Government apply some form or variation of" the "natural and probable consequences" doctrine, the Court required the defendant to "show something *special* about California's version of the doctrine—for example, that California in applying it criminalizes conduct that most other States would not consider 'theft.'" *Id.* at 191. In this context, the question was whether the "natural and probable consequences" doctrine *had been applied* in California so as to cover nongeneric crimes. See Doug Keller, *Causing Mischief for* Taylor*'s Categorical Approach: Applying "Legal Imagination" to* Duenas-Alvarez, 18 Geo. Mason L. Rev. 625, 648-649 (2011). Hypothetical convictions do not aid in this inquiry because a hypothetical act covered by California's "natural and probable consequences" doctrine is presumably covered by the doctrine in other States as well—unless California applies the doctrine in a distinctive way. But nothing in *Duenas-Alvarez* requires proof of actual prosecutions in the full range of circumstances to which a state statute may apply when that statute's plain terms reach conduct falling outside the generic criminal conduct defined by federal law: "*Duenas-Alvarez* does not require this showing when the statutory language itself, rather than 'the application of legal imagination' to that language, creates the 'realistic probability' that a state would apply the statute to conduct beyond the generic definition." *Ramos* v. *U.S. Attorney Gen.*, 709 F.3d 1066, 1071-1072 (11th Cir. 2013).

Here, the Court must decide whether bodily-injury domestic assault includes as an element the "use or attempted use of physical force." 18 U.S.C. § 921(a)(33)(A). If any act—even a hypothetical one—qualifies under a state assault statute but does not involve use of physical force, use of physical force is not an element of the offense created by that statute: "If conviction of a given offense can be secured without proof of a certain fact, then that fact is not an element of that offense." OLC Memo at *3. In *Duenas-Alvarez*, hypotheticals were irrelevant because the Court was asking how a specific doctrine had been applied *in practice*; in this case, hypotheticals are essential because the Court must determine whether an act of bodily-injury domestic assault *could* fall outside the scope of the federal statute.

The government's reliance on *Moncrieffe* is even further afield. There, the Court noted that the "state offense of conviction [satisfied] the 'elements' of the generic federal offense"; the real question in the case was whether the state conviction could be punished as a felony under federal law. 133 S. Ct. at 1687. Nothing in this holding—which reiterated that "[a]mbiguity" on the point mandates the conclusion that a defendant was prosecuted for conduct falling *outside* the generic federal definition (*ibid.*)—supports the view that conduct within the express terms of a state statute should be disregarded in conducting the "categorical" inquiry. And here, the government's assertion is particularly dubious when measured against its vigorous argument that, from time immemorial, state assault laws have been understood to reach even the slightest offensive touch.

B. Section 921(a)(33)(A) Requires The *Active Employment* Of Physical Force.

The government's approach—which postulates that *any* act leading to physical injury necessarily involves the "use of physical force"—has an additional flaw: it would read the term "use" out of the statute altogether.

1. At the outset, we note that the government has abandoned the theory regarding "use" of force that it advanced in the petition for certiorari. At that point, the government asserted that, "[a]s a matter of *ordinary usage*, the defendant's 'use' of 'physical force' is an 'element' of the offense of domestic assault by causing bodily injury because physical force is the means by which injury is necessarily produced." Pet. 15 (emphasis added). But there is nothing at all ordinary in that usage: to consider the familiar examples recited by the government (see U.S. Br. 29), in everyday speech no one would say that a defendant who tricked another into drinking poison or jumping from a window "used force" to injure the victim, even though that defendant most certainly *did* cause the victim bodily injury in a but-for sense. The defendant in such a case would much more naturally be described as having "used trickery" rather than "force" to cause injury.

The government therefore no longer argues that it is advancing an "ordinary" reading of the word "use." Instead, it insists that, in the specialized, "common-law understanding of the word 'force'" (U.S. Br. 31), causing "injury through poisoning, deceit, or other subtle or indirect means" "entail[s] the use of 'force.'" U.S. Br. 29. This is so, the government continues, because, when (for example) a person poisons his victim, "he has intentionally used the forceful physical properties of the poison to achieve his objective." *Id.* at 31. But this understanding cannot be squared with the plain meaning of the text that Congress actually used.

To begin with, the offense defined by Section 922(g)(9) requires as an element the defendant's *use* of physical force. "The word 'use' in the statute must be given its 'ordinary or natural' meaning, a meaning variously defined as '[t]o convert to one's service,' 'to employ,' 'to avail oneself of,' and 'to carry out a purpose or action by means of.'" *Bailey* v. *United States*, 516 U.S. 137, 145 (1995). "These various definitions of 'use' imply action and implementation." *Ibid.*

Thus, as the Court has explained, "use" is a term that conveys the idea that the thing used (here, "physical force") has been made the user's instrument: the statutory phrase "relates to the use of force, not to the possible effect of a person's conduct." *Leocal*, 543 U.S. at 10 n.7. See *id.* at 9 (citing *Bailey*, 516 U.S. at 144 ("use" in the definition of "crime of violence" means "active employment")). Accordingly, statutory "emphasis on the use of physical force against another person * * * suggests a category of violent, active crimes." *Id.* at 11. As Judge Moore explained in her concurrence below, "it is not enough to look only at the *result* of the defendant's conduct; instead, the focus must be on the nature of the force proscribed by the statute and whether the *conduct itself* necessarily involves violent force." Pet. App. 22a. Poison may have "forceful physical properties" as a matter of organic chemistry, but no one would say that a poisoner "employs" force or "carries out a purpose by means of force" when he or she sprinkles poison in a victim's drink. It therefore is unsurprising that, as the government recognizes (U.S. Br. 29 n.10), its understanding of the "use" requirement has been rejected by numerous courts of appeals. See *United States* v. *Villegas-Hernandez*, 468 F.3d 874, 879 (5th Cir. 2006); *Chrzanoski* v. *Ashcroft*, 327 F.3d 188, 196 (2d Cir. 2003).

This understanding of the phrase "use of physical force" was well established prior to 1996. By that year, the Court had held in *Bailey* that "use" of a firearm requires active employment of the weapon. In addition, a number of contemporary circuit court decisions had expressed a similar understanding of the phrase "use of physical force" in the context of 18 U.S.C. § 16 (see, *e.g.*, *United States* v. *Doe*, 49 F.3d 859, 866 (2d Cir. 1995)); 18 U.S.C. § 3 (see, *e.g.*, *United States* v. *Innie*, 7 F.3d 840, 850 (9th Cir. 1993)); and 18 U.S.C. § 924(e)(2)(B) (see, *e.g.*, *United States* v. *Mathis*, 963 F.2d 399, 407 (D.C. Cir. 1992)).

Given that courts "generally presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts" (*Goodyear Atomic Corp.* v. *Miller*, 486 U.S. 174, 184-185 (1988)), it must be assumed that Congress was aware of this judicial interpretation of "use." And "when judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its judicial interpretations as well." *Rowe* v. *N.H. Motor Transp. Ass'n*, 552 U.S. 364, 370 (2008) (quoting *Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Dabit*, 547 U.S. 71, 85 (2006)). As a result, Congress "must be considered to have adopted" the understanding of "use" established in decisions like *Bailey* and "made it a part of the enactment" of Section 922(g)(9). *Shapiro* v. *United States*, 335 U.S. 1, 16 (1948) (quoting *Hecht* v. *Malley*, 265 U.S. 144, 152 (1924)).

2. Of course, as the government observes (U.S. Br. 14-15), at some level, *everything* that happens in the physical world is the product of the application of force; the victim of poison is injured by the operation

of force at the molecular level by the strychnine that has entered his system, while the victim who falls from a window is injured by the application of gravitational force—"a cause of the acceleration of mass" (*Johnson*, 559 U.S. at 139)—as she hits the ground. But, even apart from the inconsistency of the government's argument with ordinary usage, the simple fact that force was involved in producing the victim's injury cannot be enough to establish that the defendant "used" force as an element of the crime. If it were, Section 921(a)(33)(A)'s definition would be satisfied in literally *every* case and would add nothing at all to the statute.[13] That is not a permissible reading of the statutory text: the Court must read a statute "with the assumption that Congress intended each of its terms to have meaning. 'Judges should hesitate to treat as surplusage statutory terms in any setting, and resistance should be heightened when the words describe an element of a criminal offense.'" *Bailey*, 516 U.S. at 145 (alterations omitted).

By the same token, the government's reading of Section 922(g)(9) treats as a misdemeanor crime of domestic violence literally every intentional act that causes bodily injury. Had Congress really wanted to write such a law, "it easily could have so provided" (*Bailey*, 516 U.S. at 143); if that were the congressional intent, Congress surely would have borrowed the generic language of the dozens of state assault-and-battery laws like Tennessee's—laws that (the government notes, at U.S. Br. 11) were then on the books—that made use of just that "causes bodily injury to another" formulation. But it did not, instead defining the crime as requiring the "use of physical force." That language must be given independent meaning.

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[13] It may be that a person who persuades another to injure him- or herself has used "intellectual force or emotional force." *Johnson*, 559 U.S. at 138. But the Court explained in *Johnson* that Section 924(e)(2)(B)(i) "plainly refers to force exerted by and through concrete bodies." *Ibid.*

In arguing to the contrary, the government observes that the common-law definition of battery reached "'indirect[]' applications of force" (U.S. Br. 29) such as "administering a poison" or "causing another to jump from a window." *Id.* at 30. But the government is here assuming its conclusion; its examples simply highlight the way in which the common-law understanding of battery *departs* from the express statutory definition of "domestic violence." The government's observation thus reinforces the conclusion that it does not make sense to read the latter in light of the former.

3. There is nothing anomalous in this outcome. As we have explained, prior to the enactment of Section 921(a)(33)(A), the most recent congressional application of the "use of physical force" formulation was in statutes aimed at forcible street crimes; in such a context, one would expect Congress to apply a formula that referred to the "use" of physical force in a direct and ordinary sense. And in the particular context of this case, Congress understandably borrowed that formulation to prevent individuals who had "demonstrated propensity for the *use* of physical violence against others" from obtaining a handgun. *United States* v. *Rogers*, 371 F.3d 1225, 1229 (10th Cir. 2004) (emphasis added). "The belief underpinning § 922(g)(9) is that people who have been convicted of violence once—toward a spouse, child, or domestic partner, no less—are likely to use violence

again. That's the justification for keeping firearms out of their hands." *Skoien*, 614 F.3d at 642.

The government nevertheless suggests that reading "use of physical force" in the ordinary sense of those words will produce "statutory anomalies." U.S. Br. 11.[14] Because "[m]any States[] define a range of crimes against a person, from simple assault to murder, by specifying a particular result * * * without explicitly specifying the means by which an offender must have achieved that result" (U.S. Br. 33), the government suggests that the Sixth Circuit's reading will exclude from the reach of Section 922(g)(9) "quintessential violent crimes such as murder." *Id.* at 34. But murderers are subject to the firearm ban under Section 922(g)(1), which prohibits gun ownership by anyone "who has been convicted in any court of[] a crime punishable by imprisonment for a term exceeding one year." 18 U.S.C. § 922(g)(1). Congress thus has targeted serious results-oriented offenses such as murder using other provisions of the federal firearms ban.[15]

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[14] One such anomaly suggested by the government is that, if offensive touching is understood to be "violent force" but poisoning or trickery is not understood to involve the "use" of force, less serious offenses will be covered by Section 922(g)(9) but more serious ones will not. U.S. Br. 33. But the obvious answer to that oddity is to read the statute correctly, as not reaching offensive touching at all.

[15] The government also suggests that crimes such as "solicitation to commit a crime of violence" might not reach solicitation to commit murder. U.S. Br. 34. But Section 16(b)'s generic definition of "crime of violence" includes any felony "that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. § 16(b). That surely includes murder, as well as many other serious

4. If we are correct in what we have argued to this point, the Tennessee misdemeanor statute does not have, as an element, the use or attempted use of force in the relevant, active sense. As the district court explained below:

> The text of [the Tennessee statute] indicates that one may violate the statute without the "use of physical force." For instance, one could cause a victim to suffer bodily injury by deceiving him into drinking a poisoned beverage, without making contact of any kind, let alone violent contact, with the victim. Alternatively, one could coerce the victim into taking the drink.

Pet. App. 41a (footnote and citation omitted). The government does not deny that such conduct would support a conviction for misdemeanor domestic assault in Tennessee—although, for the reasons we have explained, it would not involve the "*use* of physical force." And that, too, is fatal to the government's case.[16]

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violent crimes. In contrast, Section 921(a)(33)(A) includes no such catch-all provision.

[16] The government reiterates its contention that "[p]urely hypothetical applications of the bodily-injury prong of Tennessee's domestic assault statute are insufficient to demonstrate that respondent's conviction does not qualify as a 'misdemeanor crime of domestic violence.'" U.S. Br. 32-33. But the government's only support for this proposition comes from *Duenas-Alvarez* and *Moncrieffe*—both of which are inapposite. See pages 31-35, *supra*.

C. Considerations Of Policy Do Not Support The Government's Reading Of Section 922(g)(9).

In the end, the government defends its position on the ground that the court of appeals' "interpretation would render Section 922(g)(9) a virtual 'dead letter' in all but (at most) a handful of States 'from the very moment of its enactment.'" U.S. Br. 40 (quoting *Hayes*, 555 U.S. at 426-427). Most state assault and battery statutes cover (a) offensive touching, (b) bodily injury, or (c) both; according to the government, the Sixth Circuit's interpretation of the statute would prevent convictions under these statutes from qualifying as misdemeanor crimes of domestic violence, an outcome that Congress "could not have intended." *Id.* at 36-38. But the current limitations on the practical scope of Section 922(g)(9) described by the government are, in substantial part, the product of decisions of this Court that post-date enactment of the statute; these limitations tell us nothing about the intent of the Congress that enacted Section 922(g)(9). Moreover, the government overlooks the state assault statutes that *do* incorporate a "use of force" element and ignores the continued availability of the modified categorical approach in those States. And whatever the validity of the government's practical concerns, they cannot justify applying a criminal statute to people who fall outside its express terms.

1. *When Congress enacted Section 922(g)(9) in 1996, it could not have anticipated that future judicial decisions would limit the applicability of the modified categorical approach.*

a. At the outset, Congress in 1996 would have had no reason to suspect that all offenses under the state statutes the government invokes would fall beyond the reach of Section 922(g)(9). In particular, Congress may well have believed that the modified categorical approach would permit courts to look at the facts of predicate convictions and to apply the firearms ban to persons who in fact engaged in domestic violence.

Although the Court first expounded the categorical and modified categorical approaches in *Taylor* v. *United States*, 495 U.S. 575 (1990), the scope of these approaches was not clarified until much later. *Taylor* suggested that courts could look beyond the statute in a "narrow range of cases" (*id.* at 602), although it did not explain comprehensively which cases fall within that range or what record materials could be considered in those cases. Given this state of the law, the Congress that enacted Section 922(g)(9) may have believed that courts could assess the facts underlying a prior conviction to determine whether it qualified as a predicate offense, rendering moot the government's current concerns about enforcement.

In 1992, the First Circuit held that courts could assess the facts of a crime—as revealed, for example, in presentence reports—to determine whether an act qualified as a predicate offense. *United States* v. *Harris*, 964 F.2d 1234, 1236-1237 (1st Cir. 1992) (Breyer, C.J.). The Tenth Circuit followed suit in 1993, the Sixth Circuit in 1994, the Second Circuit in

1995, and the Eleventh Circuit in 1996.[17] Shortly after the enactment of Section 922(g)(9), a Third Circuit decision even permitted a court to consult letters from defense counsel to the probation officer and sentencing judge in assessing the facts underlying a predicate conviction. *United States* v. *Bennett*, 100 F.3d 1105, 1110 (3d Cir. 1996).

Other courts of appeals specifically held that the modified categorical approach applied to any statute, whether divisible or indivisible.[18] In 1994, the Sixth Circuit wrote, "*Taylor* provides that a prior conviction meets the generic definition of a[n] [offense] where (1) the language of the statute, under which the defendant was convicted, substantially corresponds with the generic * * * definition; or (2) *regardless of the exact language of the underlying statute*, the charges brought against the defendant contained all of the elements of a generic [offense]." *United States* v. *Maness*, 23 F.3d 1006, 1008 (6th Cir. 1994)

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[17] *United States* v. *Adams*, 91 F.3d 114, 116 (11th Cir. 1996); *United States* v. *Palmer*, 68 F.3d 52, 55-56, 59 (2d Cir. 1995); *United States* v. *Kaplansky*, 42 F.3d 320, 325 (6th Cir. 1994); *United States* v. *Smith*, 10 F.3d 724, 733-734 (10th Cir. 1993); see *United States* v. *O'Neal*, 937 F.2d 1369, 1373-1374 (9th Cir. 1990), *abrogated on other grounds as recognized by United States* v. *Garcia-Cruz*, 40 F.3d 986, 988-989 (9th Cir. 1994).

[18] The "divisible"/"indivisible" terminology—at least in the context of the modified categorical approach—is of relatively recent vintage, and circuit courts that interpreted *Taylor* in the 1990s did not use this language. Courts' failure to employ these terms confirms that they were unaware that a statute's divisibility might influence the availability of the modified categorical approach. The Court did not clarify the importance of a statute's divisibility until *Descamps* v. *United States*, 133 S. Ct. 2276 (2013).

(emphasis added). The court thus concluded that *Taylor* offered judges two alternative methodologies—the categorical approach (which required analysis of the statutory language) and the modified categorical approach (which permitted courts to look beyond the statute). According to the Sixth Circuit, the modified categorical approach did not involve any assessment of the underlying statute (see *id.* at 1009-1010); the court's logic implies that this approach applied to any statute, whether divisible or indivisible. The Fourth, Fifth, Ninth, and Tenth Circuits reached the same conclusion.[19] These lower court cases were all decided before the enactment of Section 922(g)(9).[20]

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[19] *United States* v. *Blankenship*, No. 92-5354, at *1 (4th Cir. Feb. 18, 1993) (noting that it was unnecessary to assess the language of West Virginia's burglary statutes before applying the modified categorical approach); *United States* v. *Strahl*, 958 F.2d 980, 984 (10th Cir. 1992) (referring to charging documents to determine whether defendant had engaged in "unlawful entry" in violating California's burglary statute, even though the statute was not divisible with respect to the element of "unlawful entry"); *United States* v. *Garza*, 921 F.2d 59, 60-61 (5th Cir. 1991) (noting that it was unnecessary to assess the statutory definition of burglary before applying "the *Taylor* alternative," *i.e.*, the modified categorical approach); *O'Neal*, 937 F.2d at 1373-1374 (applying the modified categorical approach to determine whether defendant had engaged in "unlawful entry" in violating California's burglary statute, even though the statute was not divisible with respect to the element of "unlawful entry"), *abrogated on other grounds as recognized by United States* v. *Garcia-Cruz*, 40 F.3d 986, 988-989 (9th Cir. 1994).

[20] There were some conflicting precedents. The Seventh Circuit's jurisprudence on the modified categorical approach provides an example. In 1994, the *en banc* court implied that judges could look to factual allegations in applying the modi-

In particular, the lower courts' pre-1996 understanding of the modified categorical approach evidently reflected a distinctive understanding of the term "element" as used in this context. Thus, several circuit courts held that judges could assess the elements of a crime by looking at the facts underlying a conviction or particular conduct charged. See, *e.g.*, *Adams*, 91 F.3d at 116; *Palmer*, 68 F.3d at 55-56; *Maness*, 23 F.3d at 1008; *Blankenship*, No. 92-5354, at *1; *Harris*, 964 F.2d at 1236-1237; *O'Neal*, 937 F.2d at 1373-1374; *Garza*, 921 F.2d at 60-61.

The Sixth Circuit demonstrated this understanding of "element" in *United States* v. *Kaplansky*, 42 F.3d 320, 325 (6th Cir. 1994) (en banc). In that case, the court held that the defendant's kidnapping conviction qualified as a violent felony involving as an element the use of force because the allegations of the indictment and the defendant's guilty plea revealed that he had "failed to release the victim in a safe place unharmed." *Ibid.* Although this factual al-

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fied categorical approach. *United States* v. *Hudspeth*, 42 F.3d 1015, 1018 n.3 (7th Cir. 1994). Later that same year, a panel contradicted the *en banc* decision by holding that the modified categorical approach allowed courts to analyze only "the conduct expressly charged in the count of which a defendant was convicted." *United States* v. *Lee*, 22 F.3d 736, 738-739 (7th Cir. 1994). In 1996, a divided panel affirmed that conclusion, even as the dissenter described *Lee* as a "misguided decision" that "mistakenly and without adequate explanation departed from prior precedent." *United States* v. *Shannon*, 94 F.3d 1065, 1091 (7th Cir. 1996) (Coffey, J., concurring in part and dissenting in part). This confusion within the circuit only highlights the complicated state of the law in 1996. Given the array of conflicting decisions, Congress could not have anticipated that subsequent rulings would entirely eliminate courts' ability to make factual inquiries in applying the modified categorical approach.

legation was not formally an "element" of the kidnapping offense, the court held that it did not constitute "mere surplusage." *Ibid.* Accordingly, the court concluded that, "[b]y pleading guilty to this indictment, defendant has also necessarily admitted that he attempted to use some degree of actual physical force in restraining [the victim]." *Ibid.* Under an "elements-based" approach—as that term is understood today—the Sixth Circuit's ruling is incorrect; the factual allegation in the defendant's guilty plea was, in fact, "mere surplusage." *Ibid.* But, when *Kaplansky* was decided in 1994, the Sixth Circuit evidently did not believe that *Taylor*'s explicit endorsement of an elements-based approach precluded courts from analyzing material facts as revealed in pleading documents.

b. Since that time, the law has changed in significant ways. In the sentencing context, *Apprendi* v. *New Jersey*, 530 U.S. 466, 490 (2000)—decided four years after Congress passed Section 922(g)(9)—indicated that only juries (rather than judges) could make certain factual findings that resulted in sentence enhancements beyond the statutory maximum. Notably, both *Apprendi* dissenters warned that, in passing earlier laws, Congress might have assumed that judges would be able to assess factual allegations in imposing sentence enhancements. See *id.* at 564 (Breyer, J., dissenting); *id.* at 524 (O'Connor, J., dissenting) (noting that *Apprendi* "will surely be remembered as a watershed change in constitutional law"); *id.* at 552 ("The most unfortunate aspect of today's decision is that our precedents did not foreordain this disruption in the world of sentencing.").[21]

Following *Apprendi*, the Court continued to restrict the scope of the modified categorical approach in the sentencing context. In *Shepard* v. *United States*, 544 U.S. 13, 16 (2005), the Court limited the types of documents that sentencing judges could consult in applying that approach—overturning circuit court decisions that permitted judges to assess the facts of prior convictions as revealed in presentencing reports or police reports. In *Descamps* v. *United States*, 133 S. Ct. 2276, 2281-2282, 2288 (2013), the Court relied on *Apprendi* in holding that the modified categorical approach applied only to divisible statutes.

In this context, the 1996 Congress might well have expected that courts could use the modified categorical approach when analyzing a conviction under any state domestic assault statute—divisible or indivisible—that criminalized a broader range of conduct than Section 922(g)(9). Congress might also have reasonably believed that courts could refer to a wide range of materials to determine the factual underpinnings of predicate convictions. Subsequent judicial decisions have clarified the application of the categorical and modified categorical approaches, but the Court cannot impute clairvoyant knowledge of those decisions to the Congress that enacted the firearm prohibition in 1996. The government's argument about the impact of the decision below on enforcement of Section 922(g)(9) under current law therefore says nothing to support the notion that Congress would have regarded the law as a nullity when enacted.

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[21] Justice O'Connor made the same point in her dissent in *Shepard* v. *United States*: "I strongly suspect that the driving force behind [*Shepard*] is not *Taylor* itself, but rather '[d]evelopments in the law since *Taylor*.' A majority of the Court defends its rule as necessary to avoid a result that might otherwise be unconstitutional under *Apprendi* v. *New Jersey*, and related cases." 544 U.S. at 37 (O'Connor, J., dissenting) (citation omitted).

In saying this, we do not suggest that the Court should either depart from the now-settled understanding of what constitutes the "elements" of a crime or countenance broad factual inquiries into a defendant's actual conduct in making determinations such as the one required in this case. Our point, simply, is that Congress in 1996 might not have anticipated evolution of the law governing the categorical and modified categorical approaches—a reality that undermines the government's contention that "the 'paucity of state' statutes that conform to the lower courts' approach" (U.S. Br. 40) must be understood to mean that Congress in 1996 meant to criminalize a far broader range of substantive conduct than appears on the face of Sections 921(a)(33)(A) and 922(g)(9).

2. *Many state laws bar domestic abusers from acquiring firearms.*

The government raises other enforcement concerns in its discussion of the Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993) (primarily codified at 18 U.S.C. § 922(s)-(t)). U.S. Br. 43-44. That Act prohibits firearm dealers from selling guns to people who are not permitted to purchase them under federal or state law. 18 U.S.C. § 922(s)(1). The government asserts that the Sixth Circuit's interpretation would undermine this Act's purpose by permitting the sale of firearms to people who have committed misdemeanor crimes of domestic violence. In particular, the government suggests that, "[b]etween NICS's [National Instant Criminal Background Check System] creation in November 1998 and December 2012, misdemeanor crime of domestic violence convictions have accounted for more than 100,000 federal denials—the second most common reason for denying firearms to a prospective purchaser." U.S. Br. 43 (citing FBI, *National Instant Background Check System (NICS) Operations 2012*, http://www.fbi.gov/aboutus/cjis/nics/reports/2012-operations-report ("2012 Report")).

The government's dramatic numbers, however, hide the ameliorative effect of *state* prohibitions on firearm possession. The NICS system first "determines if a federal prohibitor exists"; if none does, "the NICS Section employee processing the background check must further review the record match(es) to determine if any applicable state law renders the prospective firearms transferee prohibited." 2012 Report. This means that state prohibitions on firearm purchases, many of which prevent domestic abusers from purchasing firearms, may be underrepresented in the FBI's statistics. Currently, at least thirty-three States have laws that limit firearm possession by people who have committed misdemeanor domestic assault or battery or are subject to domestic violence protective orders. See, *infra*, Appendices A and B. Even if Section 922(g)(9) is read narrowly, there will not be 100,000 more potential abusers in possession of firearms.

3. *Several States have enacted statutes that require "use of violent force" as an element.*

The government's concern about enforcement is overstated for another reason: several state misdemeanor domestic assault or battery statutes include use of violent force as an element, and other States may follow suit by enacting similar laws. For example, Colorado defines "domestic violence" as "an act or threatened act of *violence* upon a person with whom the actor is or has been involved in an intimate relationship." Colo. Rev. Stat. Ann. § 18-6-800.3 (West 2013) (emphasis added). Similarly, Louisiana defines "[d]omestic abuse battery" as "the intentional use of force or *violence* committed by one household member upon the person of another household member." La. Rev. Stat. Ann. § 14:35.3 (2012) (emphasis added). See Cal. Fam. Code § 6211 (West 2013) (defining "domestic violence" as "abuse," where "abuse" —described in Cal. Fam. Code § 6203 (West 2013) and Cal. Fam. Code § 6320 (West 2013)—includes violent acts like "attacking" and "striking"); Colo. Rev. Stat. Ann. § 13-14-101 (West 2013) ("'Domestic abuse' means any act, attempted act, or threatened act of violence, stalking, harassment, or coercion * * *."); Idaho Code Ann. § 18-918(3)(b) (West 2013) (defining "domestic battery" by reference to the State's generic battery statute, Idaho Code Ann. § 18-903 (West 2013), which characterizes one form of battery as "willful and unlawful use of force or violence upon the person of another"); Utah Code Ann. § 77-36-1 (West 2013) ("'Domestic violence' means any criminal offense involving violence or physical harm or threat of violence or physical harm, or any attempt, conspiracy, or solicitation to commit a criminal offense involving violence or physical harm, when committed by one cohabitant against another.").

Other States have created "aggravated misdemeanor" offenses, which may capture people who commit violent assaults but plead down to misdemeanors. For example, Iowa's Code states that a person commits "[a]n aggravated misdemeanor[] if the domestic abuse assault is committed by knowingly impeding the normal breathing or circulation of the blood of another by applying pressure to the throat or neck of the other person or by obstructing the nose or mouth of the other person." Iowa Code Ann. § 708.2A(2)(d) (West 2013). This type of statute provides a way for state legislatures to create "aggravated" assault or battery misdemeanors that encompass the federal law's "use of physical force" requirement; at the same time, States can still maintain lower-grade assault charges for persons whose actions do not rise to the level of physical violence.

Furthermore, even under the restrictive version of the modified categorical approach that the Court endorsed in *Descamps*, courts can still apply this approach to divisible statutes. Idaho's current domestic violence statute provides an example that other States might follow, defining domestic violence by reference to its generic battery statute, which reaches (a) "[w]illful and unlawful use of force or violence upon the person of another"; (b) "[a]ctual, intentional and unlawful touching or striking of another person against the will of the other"; and (c) "[u]nlawfully and intentionally causing bodily harm to an individual." Idaho Code Ann. § 18-903 (West 2013). Under the Sixth Circuit's reading of Section 922(g)(9), a conviction under the first prong of Idaho's statute may categorically qualify as a misdemeanor crime of domestic violence, while a conviction under either of the latter two prongs likely does not. Because the statute is divisible—identifying three different ways to commit the crime of battery—under *Descamps* a court could apply the modified categorical approach to determine the specific prong under which a defendant was convicted. Such statutes allow for enforcement of Section 922(g)(9).

4. Policy concerns do not justify departure from the unambiguous statutory language.

Finally, even if these possibilities do not allay all enforcement concerns, the Court should not permit the government's pragmatic arguments to supersede the plain meaning of Section 922(g)(9). In *Johnson*, the Court held that enforcement challenges do not justify a departure from the ordinary meaning of plain statutory text:

> It may well be true, as the Government contends, that in many cases state and local records from battery convictions will be incomplete. But absence of records will often frustrate application of the modified categorical approach—not just to battery but to many other crimes as well. It is implausible that avoiding that common-enough consequence with respect to the single crime of battery, under the single statute that is the Armed Career Criminal Act, caused Congress to import a term of art that is a comical misfit with the defined term "violent felony."[22]

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[22] This observation also directly refutes the government's objection that "the modified categorical approach may often be

559 U.S. at 145 (citation omitted).

The same fundamental point answers the arguments of the government's *amici* that our reading will obstruct Congress's attempts to deal with "a well-documented problem—indeed, a problem of crisis proportions." National Network to End Domestic Violence Br. 12; see also, *e.g.*, Children's Defense Fund Br. 3 (referring to domestic violence as a "pervasive national problem"). We certainly agree that domestic violence presents a profoundly serious and difficult problem—but it is one that Congress addressed by focusing on individuals who previously committed acts of physical violence, and who therefore present a heightened risk of future violence. If the government is correct that reading Section 922(g)(9) as Congress wrote it produces an unwarranted result, "it is for Congress, and not this Court, to enact the words that will produce the result the Government seeks." *Bifulco* v. *United States*, 447 U.S. 381, 401 (1980).

CONCLUSION

The judgment for the court of appeals should be affirmed.

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unavailable in practice because state and local records generally track the statutory language and do not specify which one (of several) disjunctive elements the defendant violated." U.S. Br. 41 n.20. These concerns should not convince the Court to adopt an interpretation that otherwise does not fit with the statute's text.

Respectfully submitted.

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APPENDICES

APPENDIX A

STATE LAWS THAT PROHIBIT PEOPLE WHO HAVE COMMITTED MISDEMEANOR DOMESTIC ASSAULT OR BATTERY FROM POSSESSING FIREARMS

Arizona: Ariz. Rev. Stat. Ann. § 13-3101(A)(7)(d) (2013) ("'Prohibited possessor' [of a firearm] means any person * * * [w]ho is at the time of possession serving a term of probation pursuant to a conviction for a domestic violence offense as defined in § 13-3601 * * *."); Ariz. Rev. Stat. Ann. § 13-3601(A) (2013) ("'Domestic violence' means any act that is * * * an offense prescribed in § * * * 13-1203); Ariz. Rev. Stat. Ann. § 13-1203(A) (2013) (defining assault).

Delaware: Del. Code Ann. tit. 11, § 1448(a)(7) (West 2013) ("[T]he following persons are prohibited from purchasing, owning, possessing or controlling a deadly weapon or ammunition for a firearm within the State: * * * Any person who has been convicted in any court of any misdemeanor crime of domestic violence. For purposes of this paragraph, the term 'misdemeanor crime of domestic violence' means any misdemeanor offense that: * * * Is an offense as defined under § 601 * * *."); Del. Code Ann. tit. 11, § 601 (West 2013) (defining "offensive touching"); Del. Code Ann. tit. 11, § 1448(d) (West 2013) ("Any person who is a prohibited person solely as the result of a conviction for an offense which is not a felony shall not be prohibited from purchasing, owning, possessing or controlling a deadly weapon or ammunition for a firearm if 5 years have elapsed from the date of conviction.").

Illinois: 430 Ill. Comp. Stat. Ann. 65/8(l) (West 2013) ("The Department of State Police has authority to deny an application for or to revoke and seize a Firearm Owner's Identification Card previously issued under this Act only if the Department finds that the applicant or the person to whom such card was issued is or was at the time of issuance: * * * A person who has been convicted of domestic battery, aggravated domestic battery, or a substantially similar offense in another jurisdiction committed before, on or after January 1, 2012 (the effective date of Public Act 97-158).").

Iowa: Iowa Code Ann. § 724.26(2)(a), (c) (West 2013) ("Except as provided in paragraph "b", a person * * * who has been convicted of a misdemeanor crime of domestic violence under 18 U.S.C. § 922(g)(9) and who knowingly possesses, ships, transports, or receives a firearm, offensive weapon, or ammunition is guilty of a class "D" felony. * * * For purposes of this section, "misdemeanor crime of domestic violence" means an assault under section 708.1, subsection 2, paragraph "a" or "c", committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.").

Minnesota: Minn. Stat. Ann. § 609.2242(3)(b), (c) (West 2013) ("If the court determines that the assault was of a family or household member, and that the offender owns or possesses a firearm and used it in any way during the commission of the assault, it shall order that the firearm be summarily forfeited under section 609.5316, subdivision 3. * * * When a person is convicted of assaulting a family or household member and is determined by the court to have used a firearm in any way during commission of the assault, the court may order that the person is prohibited from possessing any type of firearm for any period longer than three years or for the remainder of the person's life."); Minn. Stat. Ann. § 624.713(1)(9) (West 2013) ("The following persons shall not be entitled to possess a pistol or semiautomatic military-style assault weapon or, except for clause (1), any other firearm: * * * a person who has been convicted in this state or elsewhere of assaulting a family or household member and who was found by the court to have used a firearm in any way during commission of the assault is prohibited from possessing any type of firearm for the period determined by the sentencing court * * *").

Montana: Mont. Code Ann. § 45-5-206(7) (West 2013) ("The court may prohibit an offender convicted under this section [which criminalizes partner or family member assault] from possession or use of the firearm used in the assault.").

New Hampshire: N.H. Rev. Stat. Ann. § 173-B:5(I) (2013) ("Upon a showing of abuse of the plaintiff by a preponderance of the evidence, the court shall grant such relief as is necessary to bring about a cessation of abuse. Such relief shall direct the defendant to relinquish to the peace officer any and all firearms and ammunition in the control, ownership, or possession of the defendant, or any other person on behalf of the defendant for the duration of the protective order.").

New Jersey: N J. Stat. Ann. § 2C:39-7(b)(1), (2) (West 2013) ("A person having been convicted in this State or elsewhere of the crime of aggravated assault

* * * or a crime involving domestic violence as defined in section 3 of P.L.1991, c. 261 (C.2C:25-19), whether or not armed with or having in his possession a weapon enumerated in subsection r. of N.J.S.2C: 39-1 * * * who purchases, owns, possesses or controls a firearm is guilty of a crime of the second degree and upon conviction thereof, the person shall be sentenced to a term of imprisonment by the court."); N.J. Stat. Ann. § 2C:25-19(a) (West 2013) (defining "domestic violence" to include, among other things, "assault").

Tennessee: Tenn. Code Ann. § 39-13-111(c)(6) (West 2013) ("A person convicted of a violation of this section [which criminalizes domestic assault] shall be required to terminate, upon conviction, possession of all firearms that the person possesses as required by § 36-3-625.").

Texas: Tex. Penal Code Ann. § 46.04(b) (West 2013) ("A person who has been convicted of an offense under Section 22.01, punishable as a Class A misdemeanor and involving a member of the person's family or household, commits an offense if the person possesses a firearm before the fifth anniversary of the later of: (1) the date of the person's release from confinement following conviction of the misdemeanor; or (2) the date of the person's release from community supervision following conviction of the misdemeanor."); Tex. Penal Code Ann. § 22.01 (West 2013) (defining assault).

Washington: Wash. Rev. Code Ann. § 9.41.040(2)(a)(i) (West 2013) ("A person, whether an adult or juvenile, is guilty of the crime of unlawful possession of a firearm in the second degree, if * * * the person owns, has in his or her possession, or has in his or her control any firearm: * * * After having previously been convicted or found not guilty by reason of insanity in this state or elsewhere of * * * any of the following crimes when committed by one family or household member against another, committed on or after July 1, 1993: Assault in the fourth degree * * *.").

West Virginia: W. Va. Code Ann. § 61-7-7(a)(8) (West 2013) ("Except as provided in this section, no person shall possess a firearm * * * who: * * * Has been convicted of a misdemeanor offense of assault or battery either under the provisions of section twenty-eight, article two of this chapter or the provisions of subsection (b) or (c), section nine of said article or a federal or state statute with the same essential elements in which the victim was a current or former spouse, current or former sexual or intimate partner, person with whom the defendant has a child in common, person with whom the defendant cohabits or has cohabited, a parent or guardian, the defendant's child or ward or a member of the defendant's household at the time of the offense or has been convicted in any court of any jurisdiction of a comparable misdemeanor crime of domestic violence.").

APPENDIX B

STATE LAWS THAT PROHIBIT PEOPLE WHO ARE SUBJECT TO DOMESTIC VIOLENCE PROTECTIVE ORDERS FROM POSSESSING FIREARMS

Alaska: Alaska Stat. Ann. § 18.66.100(c)(6)-(7) (West 2013) ("A protective order under this section may * * * prohibit the respondent from using or possessing a deadly weapon if the court finds the respondent was in the actual possession of or used a weapon during the commission of domestic violence; * * * direct the respondent to surrender any firearm owned or possessed by the respondent if the court finds that the respondent was in the actual possession of or used a firearm during the commission of the domestic violence.").

Arizona: Ariz. Rev. Stat. Ann. § 13-3602(G)(4) (2013) ("If a court issues an order of protection, the court may do any of the following: * * * If the court finds that the defendant is a credible threat to the physical safety of the plaintiff or other specifically designed persons, prohibit the defendant from possessing or purchasing a firearm for the duration of the order."); Ariz. Rev. Stat. Ann. § 13-3624(D)(4) (2013) ("An emergency order of protection may include any of the following: * * * If the court finds that the defendant may inflict bodily injury or death on the plaintiff, the defendant may be prohibited from possessing or purchasing a firearm for the duration of the order.").

Arkansas: Ark. Code Ann. § 9-15-207(b)(3) (West 2013) ("An order of protection shall include a notice to the respondent or party restrained that: * * * It is unlawful for an individual who is subject to an order of protection or convicted of a misdemeanor of domestic violence to ship, transport, or possess a firearm or ammunition pursuant to 18 U.S.C. § 922(g)(8) and (9) as it existed on January 1, 2007 * * *.").

California: Cal. Penal Code § 136.2(a)(7)(B)(i)-(ii) (West 2013) ("If a court does not issue an order pursuant to subparagraph (A) in a case in which the defendant is charged with a crime of domestic violence as defined in Section 13700, the court on its own motion shall consider issuing a protective order upon a good cause belief that harm to, or intimidation or dissuasion of, a victim or witness has occurred or is reasonably likely to occur, that provides as follows: (I) The defendant shall not own, possess, purchase, receive, or attempt to purchase or receive, a firearm while the protective order is in effect. (II) The defendant shall relinquish any firearms that he or she owns or possesses pursuant to Section 527.9 of the Code of Civil Procedure."); Cal. Penal Code § 136.2(d)(1)-(3) (West 2013) ("A person subject to a protective order issued under this section shall not own, possess, purchase, receive, or attempt to purchase or receive a firearm while the protective order is in effect. * * * The court shall order a person subject to a protective order issued under this section to relinquish any firearms he or she owns or possesses pursuant to Section 527.9 of the Code of Civil Procedure. * * * A person who owns, possesses, purchases or receives, or attempts to purchase or receive a firearm while the protective order is in effect is punishable pursuant to Section 29825."); Cal. Fam. Code § 6389(a) (West 2013) ("A person subject to a protective order, as defined in Section 6218, shall not own, possess, purchase, or receive a firearm or ammunition while that protective order is in effect."); Cal.

Civ. Proc. Code § 527.6(t) (West 2013) ("A person subject to a protective order issued under this section shall not own, possess, purchase, receive, or attempt to purchase or receive a firearm or ammunition while the protective order is in effect."); Cal. Civ. Proc. Code § 527.9(a) (West 2013) ("A person subject to a temporary restraining order or injunction issued pursuant to Section 527.6, 527.8, or 527.85 or subject to a restraining order issued pursuant to Section 136.2 of the Penal Code, or Section 15657.03 of the Welfare and Institutions Code, shall relinquish the firearm pursuant to this section.").

Colorado: Colo. Rev. Stat. Ann. § 18-1-1001(3)(c) (West 2013) ("Upon motion of the district attorney or on the court's own motion for the protection of the alleged victim or witness, the court may, in cases involving domestic violence as defined in section 18-6-800.3(1), * * * enter any of the following further orders against the defendant: * * * An order prohibiting possession or control of firearms or other weapons * * *"); Colo. Rev. Stat. Ann. § 18-1-1001(9)(a)(I) (West 2013) ("When the court subjects a defendant to a mandatory protection order that qualifies as an order described in 18 U.S.C. sec. 922(g)(8), the court, as part of such order: * * * Shall order the defendant to: * * * Refrain from possessing or purchasing any firearm or ammunition for the duration of the order; and * * * Relinquish, for the duration of the order, any firearm or ammunition in the defendant's immediate possession or control or subject to the defendant's immediate possession or control * * *.).

Delaware: Del. Code Ann. tit. 10, § 1045(a)(8), (11) (West 2013) ("After consideration of a petition for a protective order, the Court may grant relief as follows: * * * Order the respondent to temporarily relinquish to the sheriff, constable or to a police officer the respondent's firearms and to refrain from purchasing or receiving additional firearms for the duration of the order; * * * Issue an order directing any law-enforcement agency to forthwith search for and seize firearms of the respondent upon a showing by the petitioner that the respondent has possession of a firearm * * *.").

District of Columbia: D.C. Code § 16-1005(c)(10) (2013) ("If, after hearing, the judicial officer finds that there is good cause to believe the respondent has committed or threatened to commit a criminal offense against the petitioner or against petitioner's animal or an animal in petitioner's household, the judicial officer may issue a protection order that: * * * Directs the respondent to relinquish possession of any firearms * * *.").

Florida: Fla. Stat. Ann. § 741.30(6)(g) (West 2013) ("A final judgment on injunction for protection against domestic violence entered pursuant to this section must, on its face, indicate that it is a violation of s. 790.233, and a first degree misdemeanor, for the respondent to have in his or her care, custody, possession, or control any firearm or ammunition."); Fla. Stat. Ann. § 741.31(4)(b)(1) (West 2013) ("It is a violation of s. 790.233, and a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083, for a person to violate a final injunction for protection against domestic violence by having in his or her care, custody, possession, or control any firearm or ammunition."); Fla. Stat. Ann. § 790.233(1) (West 2013) ("A person may not have in his or her care, custody, possession, or control any firearm or ammunition if the person has been issued a final injunction that is currently in force and effect, restraining that person from committing acts of domestic violence, as issued under s. 741.30 or from committing acts of stalking or cyberstalking, as issued under s. 784.0485.").

Hawaii: Haw. Rev. Stat. § 134-7(f) (West 2013) ("No person who has been restrained pursuant to an order of any court, including an ex parte order as provided in this subsection, from contacting, threatening, or physically abusing any person, shall possess, control, or transfer ownership of any firearm or ammunition therefor, so long as the protective order, restraining order, or any extension is in effect, unless the order, for good cause shown, specifically permits the possession of a firearm and ammunition.").

Illinois: 725 Ill. Comp. Stat. Ann. 5/112A-14(b)(14.5)(A) (West 2013) ("A person who is subject to an existing order of protection, interim order of protection, emergency order of protection, or plenary order of protection, issued under this Code may not lawfully possess weapons under Section 8.2 of the Firearm Owners Identification Card Act."); 750 Ill. Comp. Stat. Ann. 60/214(b)(14.5)(a) (West 2013) ("The remedies to be included in an order of protection shall be determined in accordance with this Section * * *. * * * Prohibit a respondent against whom an order of protection was issued from possessing any firearms during the duration of the order if the order: (1) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate; (2) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and (3)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or (ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury.").

Indiana: Ind. Code Ann. § 34-26-5-9(c)(4) (West 2013) ("A court may grant the following relief after notice and a hearing, whether or not a respondent appears, in an order for protection or in a modification of an order for protection: * * * Prohibit a respondent from using or possessing a firearm, ammunition, or a deadly weapon specified by the court, and direct the respondent to surrender to a specified law enforcement agency the firearm, ammunition, or deadly weapon for the duration of the order for protection unless another date is ordered by the court."); Ind. Code Ann. § 34-26-5-9(f) (West 2013) ("Upon a showing of domestic or family violence by a preponderance of the evidence, the court shall grant relief necessary to bring about a cessation of the violence or the threat of violence. The relief may include an order directing a respondent to surrender to a law enforcement officer or agency all firearms, ammunition, and deadly weapons: (1) in the control, ownership, or possession of a respondent; or (2) in the control or possession of another person on behalf of a respondent; for the duration of the order for protection unless another date is ordered by the court.").

Iowa: Iowa Code Ann. § 236.4(2) (West 2013) ("The court may enter any temporary order it deems necessary to protect the plaintiff from domestic abuse prior to the hearing, including temporary custody or visitation orders pursuant to subsection 3, upon good cause shown in an ex parte proceeding. * * * A temporary order issued pursuant to this subsection shall specifically include notice that the person may be required to relinquish all firearms, offensive weapons, and ammunition upon the issuance of a permanent order pursuant to section 236.5."); Iowa Code Ann. § 236.5(1)(b)(2) (West 2013) ("Upon a finding that the defendant has engaged in domestic abuse: * * * The court may grant a protective order or approve a consent agreement which may contain but is not limited to any of the following provisions: * * * That the defendant not knowingly possess, ship, transport, or receive firearms, offensive weapons, and ammunition in violation of section 724.26, subsection 2."); Iowa Code Ann. § 664A.3(6) (West 2013) ("A no-contact order issued pursuant to this section shall specifically include notice that the person may be required to relinquish all firearms, offensive weapons, and ammunition upon the issuance of a permanent no-contact order pursuant to section 664A.5."); Iowa Code Ann. § 724.26(3) (West 2013) ("Upon the issuance of a protective order or entry of a judgment of conviction described in subsection 2, the court shall inform the person who is the subject of such order or conviction that the person shall not possess, ship, transport, or receive a firearm, offensive weapon, or ammunition while such order is in effect or until such conviction is vacated or until the person's rights have been restored in accordance with section 724.27.").

Maine: Me. Rev. Stat. tit. 19-A, § 4007(1)(A-1) (2013) ("The court, after a hearing and upon finding that the defendant has committed the alleged abuse or engaged in the alleged conduct described in section 4005, subsection 1, may grant a protective order or, upon making that finding, approve a consent agreement to bring about a cessation of abuse or the alleged conduct. * * * Relief granted under this section may include: * * * Directing the defendant not to possess a firearm or other dangerous weapon for the duration of the order.").

Maryland: Md. Code Ann., Fam. Law § 4-505(a)(2)(viii) (West 2013) ("The temporary protective order may order any or all of the following relief: * * * order the respondent to surrender to law enforcement authorities any firearm in the respondent's possession, and to refrain from possession of any firearm, for the duration of the temporary protective order if the abuse consisted of: 1. the use of a firearm by the respondent against a person eligible for relief; 2. a threat by the respondent to use a firearm against a person eligible for relief; 3. serious bodily harm to a person eligible for relief caused by the respondent; or 4. a threat by the respondent to cause serious bodily harm to a person eligible for relief * * *."); Md. Code Ann., Fam. Law § 4-506(f) (West 2013) ("The final protective order shall order the respondent to surrender to law enforcement authorities any firearm in the respondent's possession, and to refrain from possession of any firearm, for the duration of the protective order.").

Massachusetts: Mass. Gen. Laws Ann. ch. 140, § 129B(1)(viii) (West 2013) ("Any person residing or having a place of business within the jurisdiction of the licensing authority or any person residing in an area of exclusive federal jurisdiction located within a city or town may submit to the licensing authority an application for a firearm identification card, or renewal of the same, which the licensing authority shall issue, unless the applicant: * * * is currently subject to: * * * a permanent or temporary protection order issued pursuant to chapter 209A or a similar order issued by another jurisdiction."); Mass. Gen. Laws Ann. ch. 140, § 131(d)(vi) (West 2013) (similar); Mass. Gen. Laws Ann. ch. 209A, § 3B (West 2013) ("Upon issuance of a temporary or emergency order under section four or five of this chapter, the court shall, if the plaintiff demonstrates a substantial likelihood of immediate danger of abuse, order the immediate suspension and surrender of any license to carry firearms and or firearms identification card which the defendant may hold and order the defendant to surrender all firearms, rifles, shotguns, machine guns and ammunition which he then controls, owns or possesses in accordance with the provisions of this chapter * * *."); Mass. Gen. Laws Ann. ch. 209A, § 3C (West 2013) ("Upon the continuation or modification of an order issued pursuant to section 4 or upon petition for review as described in section 3B, the court shall also order or continue to order the immediate suspension and surrender of a defendant's license to carry firearms, including a Class A or Class B license, and firearms identification card and the surrender of all firearms, rifles, shotguns, machine guns or ammunition which such defendant then controls, owns or possesses if the court makes a determination that the return of such license to carry firearms, including a Class A or Class B license, and firearm identification card or firearms, rifles, shotguns, machine guns or ammunition presents a likelihood of abuse to the plaintiff.").

Michigan: Mich. Comp. Laws Ann. § 600.2950(1)(e) (West 2013) ("[A]n individual may petition the family division of circuit court to enter a personal protection order to restrain or enjoin a spouse, a former spouse, an individual with whom he or she has had a child in common, an individual with whom he or she has or has had a dating relationship, or an individual residing or having resided in the same household as the petitioner from doing 1 or more of the following: * * * (e) Purchasing or possessing a firearm.").

Minnesota: Minn. Stat. Ann. § 518B.01(14)(j) (West 2013) ("When a person is convicted under paragraph (b) or (c) of violating an order for protection and the court determines that the person used a firearm in any way during commission of the violation, the court may order that the person is prohibited from possessing any type of firearm for any period longer than three years or for the remainder of the person's life."); Minn. Stat. Ann. § 518B.01(14)(m) (West 2013) ("If the court determines that a person convicted under paragraph (b) or (c) of violating an order for protection owns or possesses a firearm and used it in any way during the commission of the violation, it shall order that the firearm be summarily forfeited under section 609.5316, subdivision 3.").

Montana: Mont. Code Ann. § 40-15-201(2)(f) (West 2013) ("Upon a review of the petition and a finding that the petitioner is in danger of harm if the court does not act immediately, the court shall issue a temporary order of protection that grants the petitioner appropriate relief. The temporary order of protection may include any or all of the following orders: * * * (f) prohibiting the respondent from possessing or using the firearm used in the assault * * *.").

Nebraska: Neb. Rev. Stat. Ann. § 42-924(1)(g) (West 2013) ("Any victim of domestic abuse may file a petition and affidavit for a protection order as provided in subsection (2) of this section. Upon the filing of such a petition and affidavit in support thereof, the court may issue a protection order without bond granting the following relief: * * * (g) Enjoining the respondent from possessing or purchasing a firearm as defined in section 28-1201 * * *.").

Nevada: Nev. Rev. Stat. Ann. § 33.031 (West 2013) ("A court may include in an extended order issued pursuant to NRS 33.030: (a) A requirement that the adverse party surrender, sell or transfer any firearm in the adverse party's possession or under the adverse party's custody or control in the manner set forth in NRS 33.033; and (b) A prohibition on the adverse party against possessing or having under the adverse party's custody or control any firearm while the order is in effect."); Nev. Rev. Stat. Ann. § 33.033 (West 2013) ("If a court orders an adverse party to surrender any firearm pursuant to NRS 33.031, the adverse party shall, not later than 24 hours after service of the order: (a) Surrender any firearm in the adverse party's possession or under the adverse party's custody or control to the appropriate local law enforcement agency designated by the court in the order; (b) Surrender any firearm in the adverse party's possession or under the adverse party's custody or control to a person designated by the court in the order; or (c) Sell or transfer any firearm in the adverse party's possession or under the adverse party's custody or control to a licensed firearm dealer.").

New Hampshire: N.H. Rev. Stat. Ann. § 173-B:4(I) (2013) ("Upon a showing of an immediate and present danger of abuse, the court may enter temporary orders to protect the plaintiff with or without actual notice to defendant. * * * Such temporary relief may direct the defendant to relinquish to a peace officer any and all firearms and ammunition in the control, ownership, or possession of the defendant, or any other person on behalf of the defendant for the duration of the protective order."); N.H. Rev. Stat. Ann. § 173-B:5(II) (2013) ("The defendant shall be prohibited from purchasing, receiving, or possessing any deadly weapons and any and all firearms and ammunition for the duration of the order. The court may subsequently issue a search warrant authorizing a peace officer to seize any deadly weapons specified in the protective order and any and all firearms and ammunition, if there is probable cause to believe such firearms and ammunition and specified deadly weapons are kept on the premises or curtilage of the defendant."); N.H. Rev. Stat. Ann. § 173-B:9(I)(b) (2013) ("Subsequent to an arrest [for violating either a temporary or permanent protective order], the peace officer shall seize any firearms and ammunition in the control, ownership, or possession of the defendant and any deadly weapons which may have been used, or were threatened to be used, during the violation of the protective order.").

New Jersey: N.J. Stat. Ann. § 2C:25-26(a) (West 2013) ("When a defendant charged with a crime or offense involving domestic violence is released from custody before trial on bail or personal recognizance, * * * [t]he court may enter an order prohibiting the defendant from possessing any firearm or other weapon enumerated in subsection r. of N.J.S.2C:39-1 and ordering the search for and seizure of any such weapon at any location where the judge has reasonable cause to believe the weapon is located."); N.J. Stat. Ann. § 2C:25-21(d)(3) (West 2013) (noting that courts may determine, after conducting an appropriate hearing, that firearms seized following a domestic violence incident "are not to be returned to the owner"); N.J. Stat. Ann. § 2C:25-28(j) (West 2013) ("Emergency relief may include * * * forbidding the defendant from possessing any firearm or other weapon enumerated in subsection r. of N.J.S.2C:39-1, ordering the search for and seizure of any such weapon at any location where the judge has reasonable cause to believe the weapon is located and the seizure of any firearms purchaser identification card or permit to purchase a handgun issued to the defendant * * *."); N.J. Stat. Ann. § 2C:25-29(b) (West 2013) ("[A]ny restraining order issued by the court shall bar the defendant from purchasing, owning, possessing or controlling a firearm and from receiving or retaining a firearms purchaser identification card or permit to purchase a handgun pursuant to N.J.S.2C:58-3 during the period in which the restraining order is in effect or two years whichever is greater * * *."); N.J. Stat. Ann. § 2C:58-3(c)(6), (8) (West 2013) ("No handgun purchase permit or firearms purchaser identification card shall be issued: * * * To any person who is subject to a restraining order issued pursuant to the 'Prevention of Domestic Violence Act of 1991,' P.L.1991, c. 261 (C.2C:25-17 et seq.) prohibiting the person from possessing any firearm; * * * To any person whose firearm is seized pursuant to the 'Prevention of Domestic Violence Act of 1991,' P.L.1991, c. 261 (C.2C:25-17 et seq.) and whose firearm has not been returned.").

New York: N.Y. Crim. Proc. Law § 530.14(1) (McKinney 2013) ("Whenever a temporary order of protection is issued pursuant to section eight hundred twenty-eight of this article, or pursuant to subdivision one of section 530.12 or subdivision one of section 530.13 of this article: * * * the court shall suspend any such existing license possessed by the defendant, order the defendant ineligible for such a license and order the immediate surrender of any or all firearms owned or possessed where the court receives information that gives the court good cause to believe that (i) the defendant has a prior conviction of any violent felony offense as defined in section 70.02 of the penal law; (ii) the defendant has previously been found to have willfully failed to obey a prior order of protection and such willful failure involved (A) the infliction of physical injury, as defined in subdivision nine of section 10.00 of the penal law, (B) the use or threatened use of a deadly weapon or dangerous instrument as those terms are defined in subdivisions twelve and thirteen of section 10.00 of the penal law, or (C) behavior constituting any violent felony offense as defined in section 70.02 of the penal law; or (iii) the defendant has a prior conviction for stalking in the first degree as defined in section 120.60 of the penal law, stalking in the second degree as defined in section 120.55 of the penal law, stalking in the third degree as defined in section 120.50 of the penal law or stalking in the fourth degree as defined in section 120.45 of such law; and * * * the court shall where the court finds a substantial risk that the defendant may use or threaten to use a firearm unlawfully against the person or persons for whose protection the temporary order of protection is issued, suspend any such existing license possessed by the defendant, order the defendant ineligible for such a license and order the immediate surrender pursuant to subparagraph (f) of paragraph one of subdivision a of section 265.20 and subdivision six of section 400.05 of the penal law, of any or all firearms owned or possessed."); N.Y. Fam. Ct. Act § 842-a (McKinney 2013) (similar).

North Carolina: N.C. Gen. Stat. Ann. § 50B-3(a) (West 2013) ("If the court, including magistrates as authorized under G.S. 50B-2(c1), finds that an act of domestic violence has occurred, the court shall grant a protective order restraining the defendant from further acts of domestic violence. A protective order may include any of the following types of relief: * * * (11) Prohibit a party from purchasing a firearm for a time fixed in the order."); N.C. Gen. Stat. Ann. 50B-3.1(a) (West 2013) ("Upon issuance of an emergency or ex parte order pursuant to this Chapter, the court shall order the defendant to surrender to the sheriff all firearms, machine guns, ammunition, permits to purchase firearms, and permits to carry concealed firearms that are in the care, custody, possession, ownership, or control of the defendant if the court finds any of the following factors: (1) The use or threatened use of a deadly weapon by the defendant or a pattern of prior conduct involving the use or threatened use of violence with a firearm against persons. (2) The use or threatened use of a deadly weapon by the defendant or a pattern of prior conduct involving the use or threatened use of violence with a firearm against persons. (3) The use or threatened use of a deadly weapon by the defendant or a pattern of prior conduct involving the use or threatened use of violence with a firearm against persons. (4) Serious injuries inflicted upon the aggrieved party or minor child by the defendant.").

North Dakota: N.D. Cent. Code Ann. § 12.1-31.2-02(2) (West 2013) ("If the court has probable cause to believe that the individual charged or arrested [for a domestic violence offense] is likely to use, display, or threaten to use a firearm or dangerous weapon as defined in section 12.1-01-04 in any further act of violence, the court shall require that the individual surrender for safekeeping any firearm or specified dangerous weapon in or subject to the individual's immediate possession or control, to the sheriff of the county or chief of police of the city in which the individual resides."); N.D. Cent. Code Ann. § 14-07.1-02(4) (West 2013) ("Upon a showing of actual or imminent domestic violence, the court may enter a protection order after due notice and full hearing. The relief provided by the court may include any or all of the following: * * * (g) Requiring the respondent to surrender for safekeeping any firearm or other specified dangerous weapon, as defined in section 12.1-01-04, in the respondent's immediate possession or control or subject to the respondent's immediate control, if the court has probable cause to believe that the respondent is likely to use, display, or threaten to use the firearm or other dangerous weapon in any further acts of violence."); N.D. Cent. Code Ann. § 14-07.1-03(2) (West 2013) ("An ex parte temporary protection order may include: * * * (d) Requiring the respondent to surrender for safekeeping any firearm or other specified dangerous weapon, as defined in section 12.1-01-04, in the respondent's immediate possession or control or subject to the respondent's immediate control, if the court has probable cause to believe that the respondent is likely to use, display, or threaten to use the firearm or other dangerous weapon in any further acts of violence.").

Pennsylvania: 18 Pa. Cons. Stat. Ann. § 6105(a.1)(2), (c)(6) (West 2013) (prohibiting those who are "the subject of an active protection from an abuse order" from possessing firearms); 23 Pa. Cons. Stat. Ann. § 6107(b)(3) (West 2013) (permitting the court to require relinquishing of firearms, weapons, or ammunition based on signs of domestic abuse); 23 Pa. Cons. Stat. Ann. § 6108(a) (West 2013) ("The court may grant any protection order or approve any consent agreement to bring about a cessation of abuse of the plaintiff or minor children. The order or agreement may include: * * * (7) Ordering the defendant to temporarily relinquish to the sheriff the defendant's other weapons and ammunition which have been used or been threatened to be used in an incident of abuse against the plaintiff or the minor children and the defendant's firearms and prohibiting the defendant from acquiring or possessing any firearm for the duration of the order * * *.").

Rhode Island: R.I. Gen. Laws Ann. § 15-15-3(a), (West 2013) ("A person suffering from domestic abuse may file a complaint in the family court requesting any order which will protect and support her or him from abuse including, but not limited, to the following: * * * (5) After notice to the respondent and a hearing, the court in addition to any other restrictions, may order the defendant to surrender physical possession of all firearms in his or her possession, care, custody or control."); R.I. Gen. Laws Ann. § 15-15-3(d), (West 2013) ("If the defendant is present in court at a duly noticed hearing, the court may order the defendant to physically surrender any firearm in that person's immediate possession or control, or subject to that person's immediate physical possession or control, within twenty-four (24) hours of the order * * *.").

South Dakota: S.D. Codified Laws § 25-10-24 (2013) ("The court may require the defendant to surrender any dangerous weapon in his possession to local law enforcement.").

Tennessee: Tenn. Code Ann. § 39-13-113(h)(1) (West 2013) ("It is an offense and a violation of an order of protection for a person to knowingly possess a firearm while an order of protection that fully complies with 18 U.S.C. § 922(g)(8) is entered against that person and in effect, or any successive order of protection containing the language of § 36-3-606(g) and that fully complies with 18 U.S.C. § 922(g)(8) is entered against that person and in effect.").

Texas: Tex. Fam. Code Ann. § 85.022(b), (West 2013) ("In a protective order, the court may prohibit the person found to have committed family violence from: * * * (6) possessing a firearm * * *."); Tex. Fam. Code Ann. § 85.022(b), (West 2013) ("In a protective order, the court shall suspend a license to carry a concealed handgun issued under Subchapter H, Chapter 411, Government Code, that is held by a person found to have committed family violence."); Tex. Code Crim. Proc. Ann. art. 17.292(c) (West 2013) ("The magistrate in the order for emergency protection may prohibit the arrested party from: * * * (4) possessing a firearm, unless the person is a peace officer, as defined by Section 1.07, Penal Code, actively engaged in employment as a sworn, full-time paid employee of a state agency or political subdivision.").

Utah: Utah Code Ann. § 78B-7-106(2)(d) (West 2013) ("A court may grant the following relief without notice in an order for protection or a modification issued ex parte: * * * upon finding that the respondent's use or possession of a weapon may pose a serious threat of harm to the petitioner, prohibit the respondent from purchasing, using, or possessing a firearm or other weapon specified by the court.").

Virginia: Va. Code Ann. § 18.2-308.1:4 (West 2013) ("It is unlawful for any person who is subject to (i) a protective order entered pursuant to § 16.1-253.1, 16.1-253.4, 16.1-278.2, 16.1-279.1, 19.2-152.8, 19.2-152.9, or 19.2-152.10; (ii) an order issued pursuant to subsection B of § 20-103; (iii) an order entered pursuant to subsection E of § 18.2-60.3; (iv) a preliminary protective order entered pursuant to subsection

F of § 16.1-253 where a petition alleging abuse or neglect has been filed; or (v) an order issued by a tribunal of another state, the United States or any of its territories, possessions or commonwealths, or the District of Columbia pursuant to a statute that is substantially similar to those cited in clauses (i), (ii), (iii), or (iv) to purchase or transport any firearm while the order is in effect.").

Washington: Wash. Rev. Code Ann. § 9.41.800(1) (West 2013) ("Any court * * * shall, upon a showing by clear and convincing evidence, that a party has: Used, displayed, or threatened to use a firearm or other dangerous weapon in a felony, or previously committed any offense that makes him or her ineligible to possess a firearm under the provisions of RCW 9.41.040 (a) Require the party to surrender any firearm or other dangerous weapon; (b) Require the party to surrender any concealed pistol license issued under RCW 9.41.070; (c) Prohibit the party from obtaining or possessing a firearm or other dangerous weapon; (d) Prohibit the party from obtaining or possessing a concealed pistol license.").

West Virginia: W. Va. Code Ann. § 48-27-403(a) (West 2013) ("If the magistrate court determines to enter an emergency protective order, the order shall prohibit the respondent from possessing firearms."); W. Va. Code Ann. § 48-27-502(b) (West 2013) ("The protective order must prohibit the respondent from possessing any firearm or ammunition."); W. Va. Code Ann. § 61-7-7(a) (West 2013) ("[N]o person shall possess a firearm * * * who: * * * (7) [i]s subject to a domestic violence protective order * * *.").

Wisconsin: Wis. Stat. Ann. § 813.12(4m)(2) (West 2013) ("An injunction issued under sub. (4) shall * * * require the respondent to surrender any firearms that he or she owns or has in his or her possession to the sheriff of the county in which the action under this section was commenced, to the sheriff of the county in which the respondent resides or to another person designated by the respondent and approved by the judge or circuit court commissioner."); Wis. Stat. Ann. § 941.29(2)(d) (West 2013) ("A person specified in sub. (1) is guilty of a Class G felony if he or she * * * possesses a firearm while subject to the court order * * *."); Wis. Stat. Ann. § 941.29(2)(e) (West 2013) ("A person specified in sub. (1) is guilty of a Class G felony if he or she * * * possesses a firearm while the injunction, as specified in sub. (1)(f), is in effect.").

APPENDIX C

STATE LAWS THAT PERMIT POLICE OFFICERS TO TEMPORARILY CONFISCATE FIREARMS RECOVERED AT THE SCENE OF A DOMESTIC VIOLENCE INCIDENT

Alaska: Alaska Stat. Ann. § 18.65.515(b) (West 2013) ("If a peace officer investigating a crime involving domestic violence determines that it is necessary to protect the victim or the victim's family from domestic violence or to protect the officer or the public during the investigation, the officer may (1) seize a deadly weapon in plain view of the officer, and (2) if a deadly weapon was actually possessed during or used in the domestic violence, seize all deadly weapons owned, used, possessed, or within the control of the alleged perpetrator. If the weapon is not needed as evidence in a criminal case, the law enforcement agency having custody of the weapon, within 24 hours of making the determination that the weapon is not needed as evidence in a criminal case, shall make the weapon available for pickup by the owner of the weapon during regular business hours.")

Arizona: Ariz. Rev. Stat. Ann. § 13-3601(C) (2013) ("A peace officer may question the persons who are present to determine if a firearm is present on the premises. On learning or observing that a firearm is present on the premises, the peace officer may temporarily seize the firearm if the firearm is in plain view or was found pursuant to a consent to search and if the officer reasonably believes that the firearm would expose the victim or another person in the household to a risk of serious bodily injury or death.").

Connecticut: Conn. Gen. Stat. Ann. § 46b-38b(a) (West 2013) ("Whenever a peace officer determines that a family violence crime has been committed, such officer may seize any firearm or electronic defense weapon, as defined in section 53a-3, or ammunition at the location where the crime is alleged to have been committed that is in the possession of any person arrested for the commission of such crime or suspected of its commission or that is in plain view. Not later than seven days after any such seizure, the law enforcement agency shall return such firearm, electronic defense weapon or ammunition in its original condition to the rightful owner thereof unless such person is ineligible to possess such firearm, electronic defense weapon or ammunition or unless otherwise ordered by the court.").

Hawaii: Haw. Rev. Stat. § 134-7.5(a) (West 2013) ("Any police officer who has reasonable grounds to believe that a person has recently assaulted or threatened to assault a family or household member may seize all firearms and ammunition that the police officer has reasonable grounds to believe were used or threatened to be used in the commission of the offense. The police officer may seize any firearms or ammunition that are in plain view of the officer or were discovered pursuant to a consensual search, as necessary for the protection of the officer or any family or household member. Firearms seized under this section shall be taken to the appropriate county police department for safekeeping or as evidence."); Haw. Rev. Stat. § 709-906(4)(f) (West 2013) ("Any police officer, with or without a warrant, may take the following course of action where the officer has reasonable grounds to believe that there was physical abuse or harm inflicted by one person upon a family or household member, regardless of whether the physical abuse or harm occurred in the officer's presence: * * * The police officer shall seize all firearms and ammunition that the police officer has reasonable grounds to believe were used or threatened to be used in the commission of an offense under this section.")

Illinois: 725 Ill. Comp. Stat. Ann. 5/112A-30(a)(2) (West 2013) ("Whenever a law enforcement officer has reason to believe that a person has been abused by a family or household member, the officer shall immediately use all reasonable means to prevent further abuse, including: * * * If there is probable cause to believe that particular weapons were used to commit the incident of abuse, subject to constitutional limitations, seizing and taking inventory of the weapons * * *."); 750 Ill. Comp. Stat. Ann. 60/304(a)(2) (West 2013) ("Whenever a law enforcement officer has reason to believe that a person has been abused, neglected, or exploited by a family or household member, the officer shall immediately use all reasonable means to prevent further abuse, neglect, or exploitation, including: * * * If there is probable cause to believe that particular weapons were used to commit the incident of abuse, subject to constitutional limitations, seizing and taking inventory of the weapons * * *.").

Indiana: Ind. Code Ann. § 35-33-1-1.5(b) (West 2013) ("A law enforcement officer may confiscate and remove a firearm, ammunition, or a deadly weapon from the scene if the law enforcement officer has: (1) probable cause to believe that a crime involving domestic or family violence has occurred; (2) a reasonable belief that the firearm, ammunition, or deadly weapon: (A) exposes the victim to an immediate risk of serious bodily injury; or (B) was an instrumentality of the crime involving domestic or family violence; and (3) observed the firearm, ammunition, or deadly weapon at the scene during the response.").

Maryland: Md. Code Ann., Fam. Law § 4-511(a) (West 2013) ("When responding to the scene of an alleged act of domestic violence, as described in this subtitle, a law enforcement officer may remove a firearm from the scene if: (1) the law enforcement officer has probable cause to believe that an act of domestic violence has occurred; and (2) the law enforcement officer has observed the firearm on the scene during the response.").

Montana: Mont. Code Ann. § 46-6-603(1) (West 2013) ("A peace officer who responds to a call relating to partner or family member assault shall seize the weapon used or threatened to be used in the alleged assault.").

Nebraska: Neb. Rev. Stat. Ann. § 29-440(1) (West 2013) ("Incident to an arrest under section 28-323 [relating to domestic assault], a peace officer: (a) Shall seize all weapons that are alleged to have been involved or threatened to be used; and (b) May seize any firearm and ammunition in the plain view of the officer or that is discovered pursuant to a search authorized or consented to by the person being searched or in charge of the premises being searched, as necessary for the protection of the officer or any other person.").

New Hampshire: N.H. Rev. Stat. § 173-B:10(I) (2013) ("Whenever any peace officer has probable cause to believe that a person has been abused, as defined in RSA 173-B:1, that officer shall use all means within reason to prevent further abuse including, but not limited to: (a) Confiscating any deadly weapons involved in the alleged domestic abuse and any firearms and ammunition in the defendant's control, ownership, or possession.").

New Jersey: N.J. Stat. Ann. § 2C:25-21(d)(1)(b) (West 2013) ("In addition to a law enforcement officer's authority to seize any weapon that is contraband, evidence or an instrumentality of crime, a law enforcement officer who has probable cause to believe that an act of domestic violence has been committed shall: * * * upon observing or learning that a weapon is present on the premises, seize any weapon that the officer reasonably believes would expose the victim to a risk of serious bodily injury. If a law enforcement officer seizes any firearm pursuant to this paragraph, the officer shall also seize any firearm purchaser identification card or permit to purchase a handgun issued to the person accused of the act of domestic violence.").

Ohio: Ohio Rev. Code Ann. § 2935.03(B)(3)(h) (West 2013) ("If a peace officer described in division (A) of this section responds to a report of an alleged incident of the offense of domestic violence or an alleged incident of the offense of violating a protection order and if the circumstances of the incident involved the use or threatened use of a deadly weapon or any person involved in the incident brandished a deadly weapon during or in relation to the incident, the deadly weapon that was used, threatened to be used, or brandished constitutes contraband, and, to the extent possible, the officer shall seize the deadly weapon as contraband pursuant to Chapter 2981. [*sic*] of the Revised Code.").

Oklahoma: Okla. Stat. Ann. tit. 22, § 60.8(A) (West 2013) ("Each peace officer of this state shall seize any weapon or instrument when such officer has probable cause to believe such weapon or instrument has been used to commit an act of domestic abuse as defined by Section 60.1 of this title, provided an arrest is made, if possible, at the same time.").

Pennsylvania: 18 Pa. Cons. Stat. Ann. § 2711(a) (West 2013) ("General rule.--A police officer shall have the same right of arrest without a warrant as in a felony whenever he has probable cause to believe the defendant has violated section 2504 (relating to involuntary manslaughter), 2701 (relating to simple assault), 2702(a)(3), (4) and (5) (relating to aggravated assault), 2705 (relating to recklessly endangering another person), 2706 (relating to terroristic threats) or 2709.1 (relating to stalking) against a family or household member although the offense did not take place in the presence of the police officer."); 18 Pa. Cons. Stat. Ann. § 2711(b) (West 2013) ("Seizure of weapons.--The arresting police officer shall seize all weapons used by the defendant in the commission of the alleged offense.")

Tennessee: Tenn. Code Ann. § 36-3-620(a)(1) (West 2013) ("If a law enforcement officer has probable cause to believe that a criminal offense involving domestic abuse against a victim, as defined in § 36-3-601, has occurred, the officer shall seize all weapons that are alleged to have been used by the abuser or threatened to be used by the abuser in the commission of a crime.").

Utah: Utah Code Ann. § 77-36-2.1(1)(b) (West 2013) ("A law enforcement officer who responds to an allegation of domestic violence shall use all reasonable means to protect the victim and prevent further violence, including: * * * confiscating the weapon or weapons involved in the alleged domestic violence * * *.").

West Virginia: W. Va. Code Ann. § 48-27-1002(e) (West 2013) ("Whenever any person is arrested pursuant to the provisions of this article or for a violation of an order issued pursuant to section five hundred nine or subsections (b) and (c), of section six hundred eight, article five of this chapter the arresting officer, subject to the requirements of the Constitutions of this state and of the United States: (1) Shall seize all weapons that are alleged to have been involved or threatened to be used in the commission of domestic violence; (2) May seize a weapon that is in plain view of the officer or was discovered pursuant to a consensual search, as necessary for the protection of the officer or other persons; and (3) May seize all weapons that are possessed in violation of a valid protective order.").

REPLY
BRIEF

Supreme Court, U.S.
FILED

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No. 12-1371

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v.

JAMES ALVIN CASTLEMAN

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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REPLY BRIEF FOR THE UNITED STATES

Congress intended to disarm persons who commit misdemeanor domestic assault or battery by intentionally or knowingly causing bodily injury to a family member—here, the mother of respondent's child. To achieve that result, it defined "misdemeanor crime of domestic violence" as an offense having, as an element, the "use of physical force," thus tracking common-law battery and incorporating the common-law meaning. Respondent rejects the common-law meaning and advocates an unduly rigid definition of the "use of physical force" that ignores the statutory context and cannot be squared with congressional intent. Respondent's interpretation would nullify Section 922(g)(9) by excluding assault and battery crimes in almost all States—and thereby putting firearms back in the hands of thousands of domestic abusers. None of respondent's arguments justifies that incongruous and dangerous result.

A. Assault Or Battery That Intentionally Causes Bodily Injury Necessarily Has, As An Element, The Requisite Level Of Force

Respondent contends (Br. 13-25) that Section 921(a)(33)(A) requires "violent" physical force for a crime to qualify as a "misdemeanor crime of domestic violence." And, he argues (Br. 25-27, 30-35), assault by intentionally causing bodily injury does not have, as an element, the use of such "violent" force. He is wrong at both steps of the analysis.

1. A "misdemeanor crime of domestic violence" must have, as an element, the use of "physical force," but that force need not be "violent" in nature.

a. Respondent begins (Br. 14-15) with dictionary definitions of "force" and "physical force," but that is the wrong starting point. This Court ordinarily gives a "common-law term of art * * * its established common-law meaning." *Johnson* v. *United States*, 559 U.S. 133, 139 (2010). In *Johnson*, the Court recognized that "'force' has a number of meanings" and that one of those "meanings" is the common-law definition. *Id.* at 138-139. As respondent concedes (Br. 16-17), the common-law definition of "force" includes the "slightest offensive touching" and does not require violence. *Johnson*, 559 U.S. at 138-139. So long as that meaning "fit[s]" and does not produce "nonsense" (*id.* at 139 (citation omitted)), that is the end of the analysis.

Although respondent asserts that the common-law definition does not "fit" (Br. 17), his reasons are conclusory and unpersuasive. He suggests (*ibid.*) that Congress could have "grafted the common-law definition of battery into federal law." But that is precisely what Congress did. "[C]ommon law battery was defined as the 'application of unlawful force against the person of another.'" *Id.* at 16 (quoting U.S. Br. 14). Similarly, a "misdemeanor crime of domestic violence" is defined as, *inter alia*, the "use of physical force." 18 U.S.C. 921(a)(33)(A)(ii).[1]

Respondent nevertheless insists that Congress intended to "narrow[] the field of eligible battery offenses." Br. 17; see *id.* at 16. But the fatal flaw in that argument is respondent's failure to identify any "narrower" category of battery *statutes* that satisfy his definition of "physical force." See Part C, *infra*. Congress plainly intended to identify a class of offenses that would include misdemeanor battery. See *United States* v. *Hayes*, 555 U.S. 415, 427 (2009); 142 Cong. Rec. 26,675 (1996) (statement of Sen. Lautenberg). Rather than craft a definition that applies to at most a handful of state statutes, Congress logically defined a "misdemeanor crime of domestic violence," in a statute designed to protect battered women and children, by reference to the common and common-law misdemeanor crime of battery.

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[1] Respondent later suggests (Br. 39) that Congress "could have borrowed the generic language" of state assault and battery laws requiring the causation of bodily injury. But that definition would have been too narrow. It would have excluded, for example, common-law battery that did not require injury (but still merited prosecution), as well as other misdemeanor crimes of domestic violence (*e.g.*, harassment, Ala. Code §§ 13A-6-132(a), 13A-11-8(a) (2013) (including striking, shoving, or kicking)). Congress was not required to list all existing (and to anticipate all future) misdemeanor crimes, with their varying state-law definitions and the attendant risk of underinclusiveness, in order to cover assault and battery—the quintessential crime of domestic violence.

b. Respondent next relies on (Br. 18-22) this Court's decision in *Johnson*, but the "obvious relevance" (*id.* at 21) of *Johnson* points in the exact opposite direction of respondent's position. *Johnson* expressly left open the question presented here, but its analysis is a roadmap that shows why the words "physical force" should *not* have the same meaning when defining the phrase "misdemeanor crime of domestic violence" in Section 922(g)(9) as they do when defining the phrase "violent felony" in the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(2)(B). In arguing otherwise, respondent glosses over three critical differences between the two statutes.

First, Section 922(g)(9) defines a "misdemeanor" crime of domestic violence, whereas Section 924(e)(2)(B) defines a violent "felony." Respondent contends (Br. 21-22) that the "misdemeanor-felony distinction" speaks only to the "*punishment*" and not to the "*nature*" of the offense. But that is not what the Court said in *Johnson*. This Court found it significant that the "adjective 'violent' is attached to the noun 'felony.'" 559 U.S. at 140. It declined to import the common-law definition of "force" into the ACCA because the term was being used to define a "felony," whereas common-law battery was (and still is) a "*misdemeanor*" offense. *Id.* at 141. And the Court left the question presented here open by emphasizing the difference between a "statutory definition of 'violent felony'" and a statutory definition of "*misdemeanor* crime of domestic violence." *Id.* at 143-144. Respondent's attempt to minimize the "misdemeanor-felony distinction" cannot be squared with the Court's actual analysis in *Johnson*.

Second, the term being defined is "misdemeanor crime of *domestic violence*," not "*violent* felony." "Domestic violence" carries a different connotation than the word "violence" standing alone or the adjective "violent" when used to modify the noun "felony." See U.S. Br. 19; see also Nat'l Network to End Domestic Violence (NNEDV) Amicus Br. 2-9, 27-29 ("'domestic violence' * * * denotes a spectrum of abusive behavior committed by intimate partners for purposes of coercion and control"); N.Y. State Ass'n of Chiefs of Police Amicus Br. 3-4. Respondent equates the two only by ignoring the modifier "domestic." See Br. 13, 15, 25, 26 (incorrectly suggesting "crime of violence" is the term being defined). And respondent's emphasis on the isolated word "violence" leads him to effectively concede (Br. 18 n.7) that the firearm prohibition would have been substantially broader (in his view) if Congress had only used the term "misdemeanor crime of domestic *abuse*." But legislators used "domestic violence" interchangeably with "domestic abuse" to identify the targeted crimes. See U.S. Br. 19.[2]

Third, Sections 922(g)(9) and 924(e)(2)(B) are not "closely related statutory sections" with "similar purposes." Resp. Br. 19-20. Section 922(g)(9) is "closely related" to Section 922(g)(1), the felon-in-possession provision. Indeed, Section 922(g)(9) was enacted to fill a gap left open by Section 922(g)(1), which applies to violent and nonviolent felons alike. See U.S. Br. 35-36; NNEDV Amicus Br. 21-22.

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[2] Respondent is wrong to suggest (Br. 18 n.7) that "domestic abuse" is inherently broader than "domestic violence." Like Congress, this Court has used the two terms interchangeably. See *Giles* v. *California*, 554 U.S. 353, 376-377 (2008); *Georgia* v. *Randolph*, 547 U.S. 103, 118-119 & n.7 (2006); *id.* at 126-127 (Breyer, J., concurring); *id.* at 138-141 (Roberts, C.J., dissenting).

In contrast, the ACCA is a recidivist sentencing enhancement, not a firearm prohibition. It carries a 15-year statutory minimum term of imprisonment, not a ten-year maximum.[3] And while Section 922(g)(9) has similar language to the ACCA, it is embedded in an entirely different statutory scheme. Respondent's assertion that Congress intended to "cover the same range of conduct" (Br. 19) ignores an obvious reality: misdemeanor offenses are generally defined to cover less serious conduct (for example, "bodily injury" instead of "serious bodily injury").[4] As the government explained in its opening brief (at 20-22), the significant differences between the statutes make it incongruous to import the violent "physical force" definition from the ACCA into Section 922(g)(9).

c. The "statutory background" on which respondent relies (Br. 22-25) contradicts his interpretation. Respondent contends (Br. 22) that Congress intended to reach "violent conduct similar to that addressed by

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[3] Respondent states (Br. 12, 29) that Section 922(g)(9) carries a "ten-year prison term." The statutory *maximum* sentence is ten years in prison, 18 U.S.C. 924(a)(2), but the advisory Guidelines range for a defendant who pleads guilty to a Section 922(g)(9) violation and has a criminal history category of I is ten to 16 months. See Sentencing Guidelines §§ 2K2.1(a)(6), 3E1.1(a); *id.* Ch. 5, Pt. A (Sentencing Table).

[4] Respondent's reliance on "threatened use of a deadly weapon" (Br. 15-16) to heighten the severity of all predicate offenses is flawed for a similar reason. Section 922(g)(9) covers *only* misdemeanor offenses; it was specifically intended to fill a gap left by Section 922(g)(1)'s felon-in-possession prohibition; and "serious and violent offenses" (Br. 16) involving the use of a deadly weapon are not punished as misdemeanors.

Section 924(e)(2)(B)(i) that happened to be charged as a misdemeanor rather than a felony." What respondent fails to explain is *how* his interpretation would capture "serious and violent conduct" (Br. 23) when the perpetrator is charged as a misdemeanant. Husbands who "batter" their wives do not just plead to a "misdemeanor" in the abstract; they plead to a misdemeanor defined by state law. And, under respondent's view, precious few misdemeanor offenses qualify as "misdemeanor crime[s] of domestic violence"—even when the underlying abusive conduct is "serious" or "violent" under any conceivable definition. See Part C, *infra*.

Respondent also asserts (Br. 23-24) that the "use of physical force" language was a "legislative compromise" designed "to narrow the scope of the statute to convictions based on especially severe conduct." The legislative record does not support that speculation. The "use of physical force" language was a "last-minute insertion." *Hayes*, 555 U.S. at 428. The earlier version had defined a "crime involving domestic violence" as, *inter alia*, "a felony or misdemeanor crime of violence" committed by a family member. S. 1632, 104th Cong., 2d Sess. § 1 (1996). The legislative record identifies only one concern about the breadth of that definition: that it "could be interpreted to include an act such as cutting up a credit card with a pair of scissors." 142 Cong. Rec. at 26,675 (statement of Sen. Lautenberg). The revision eliminated that concern by adopting a more precise definition that did not include crimes against property. Cf. 18 U.S.C. 16(a) and (b) (defining "crime of violence" to include the use of physical force against "property").[5] Beyond that specific narrowing, Senator Lautenberg viewed the revised definition as "broader" than the earlier version. 142 Cong. Rec. at 26,675; see Resp. Br. 23 n.9 (arguing that Senator Lautenberg's statements are "an authoritative guide to the statute's construction") (citation omitted). And whether his perception was correct, the "legislative compromise" certainly was not intended to narrow the statute out of existence.

2. Even if "violent" physical force is required, respondent's conviction for intentionally or knowingly causing bodily injury to a family member has, as an element, the use of such "violent" force. See U.S. Br. 23-28.

a. Respondent criticizes the "government's test" as "opaque" (Br. 25, 26), but the government is simply applying the definition of "violent" force expressly adopted by this Court in *Johnson*. The Court defined "violent" force as "force capable of causing physical pain or injury to another person." 559 U.S. at 140; see *id.* at 143 ("that degree of force necessary to inflict pain"). And the Court plainly assumed that the intentional causation of bodily injury has, as an element, the use of such "violent" force. U.S. Br. 25 n.9. That assumption was correct: a defendant can intentionally *cause* bodily injury only by knowingly using force *capable* of causing physical pain or injury.

Respondent does not contend otherwise. Indeed, he acknowledges (Br. 26) that "[a]n act that inflicts a stubbed toe or a paper cut doubtless causes pain and bodily injury." Respondent instead argues that to be "violent," the degree of force must be capable of producing "*serious* physical injury." Br. 25 (emphasis added) (quoting Pet. App. 17a). But the modifier "serious" appears nowhere in *Johnson*'s definition and respondent provides no reason why a heightened standard should apply to a "misdemeanor crime of domestic violence," when *any* physical injury (or pain) would suffice for a "violent felony."

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[5] The fact that Section 921(a)(33)(A) does not have a residual clause (Resp. Br. 20-21 & n.8) is not illuminating for a similar reason. See *Begay* v. *United States*, 553 U.S. 137, 144 (2008) (Section 924(e)(2)(B)(ii) was added to include "certain physically risky crimes against property.").

Nor does *Flores* v. *Ashcroft*, 350 F.3d 666 (7th Cir. 2003), provide any assistance. Resp. Br. 26. Indeed, *Johnson* relied on *Flores* to define "violent" force in a way that does not require force capable of causing "serious" bodily injury. 559 U.S. at 140 (citing *Flores*, 350 F.3d at 672); see *Flores*, 350 F.3d at 672 ("force" that is "violent in nature" is the "sort that is intended to cause bodily injury, or at a minimum likely to do so"). The distinction *Flores* made based on the severity of the injury had to do with the "accidental" causation of bodily injury; the court readily acknowledged that "acts designed to injure" "may well" "deserve the appellation 'violent.'" 350 F.3d at 670, 671. And, in *De Leon Castellanos* v. *Holder*, 652 F.3d 762, 764-767 (2011), the Seventh Circuit applied *Flores* to hold that "intentionally causing bodily harm" has, as an element, the use of "violent" physical force.

Respondent was convicted of the "intentional[]" or "knowing[]" causation of bodily injury. J.A. 27, 29. That is all *Johnson* and *Flores* require. Because intentionally or knowingly causing any bodily injury requires the use of "violent" force, "physical force" is an "element" of respondent's offense of conviction.

b. Even if the Court were to reject the definition of "violent" force adopted in *Johnson*, and conclude that force capable of intentionally causing a "stubbed toe" or a "paper cut" is insufficient, that would not be the end of the analysis. Under this Court's decisions in *Gonzalez* v. *Duenas-Alvarez*, 549 U.S. 183 (2007) and *Moncrieffe* v. *Holder*, 133 S. Ct. 1678 (2013), it is not enough to imagine that someone might someday theoretically be prosecuted under the Tennessee bodily-injury domestic assault statute for intentionally giving his wife a paper cut. Respondent's factual and legal distinctions lack merit.

On the facts, respondent contends (Br. 32-33) that "prosecutions for conduct including nonviolent domestic assault are *not* hypothetical in Tennessee." The only case respondent identifies proves otherwise. In *State* v. *Wachtel*, No. M2003-00505, 2004 WL 784865, at *3-*4, *6, *12-*13 (Tenn. Crim. App. Apr. 13, 2004), the defendant was convicted on three counts of domestic assault for grabbing his estranged wife's "arm and twist[ing] it," forcing "her to her knees," causing her to "cr[y] out in pain," and leaving a "scratch" on her arm (all while he was holding their nine-month-old daughter); "swat[ting]" at, "slap[ping]," and "scratch[ing]" his mother, causing "some scratches and bruises" (again, while holding the baby); and "repeatedly punch[ing] his father" and "choking" him, leaving his father with a "black eye" and a "red and bruised" face with "some swelling to his head." That is hardly a compelling example of a prosecution for "nonviolent" domestic assault akin to causing a paper cut.[6]

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[6] Respondent also cannot "point to his own case" as one where "the state courts in fact did apply the statute" to nonviolent conduct. *Duenas-Alvarez*, 549 U.S. at 193. Contrary to respondent's

Respondent also identifies (Br. 32-33) three people who were arrested for "less severe conduct." Section 922(g)(9), however, applies only to convictions, not arrests. The affidavits of complaint respondent relies on (see *ibid.*) identify the charge generally as "domestic assault," which is not limited to the intentional or knowing causation of bodily injury at issue here. Tenn. Code Ann. § 39-13-111(b) (Supp. 2013); see *id.* § 39-13-101(a)(2) and (3) (domestic assault includes "caus[ing] another to reasonably fear imminent bodily injury" and "caus[ing] physical contact with another [that] a reasonable person would regard * * * as extremely offensive or provocative"). And respondent's bare assertion that the underlying conduct was "nonviolent" is by no means apparent. Cf. NNEDV Amicus Br. 9-12 (domestic violence is characterized by recurring and escalating abuse).

On the law, respondent seeks to limit (Br. 33-35) *Duenas-Alvarez* to its facts. But just last Term, the Court described *Duenas-Alvarez* generally as a "qualification" to the categorical approach. See *Moncrieffe*, 133 S. Ct. at 1684-1685. And the Court relied on that "qualification" to reject the government's concern that the Court's decision would frustrate federal firearm statutes with "antique firearm" exceptions. *Id.* at 1693; see *id.* at 1686 (noting that "Georgia prosecutes" for possession with intent to distribute "when a de-

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suggestion (Br. 32) that the record is silent, the arrest report shows conduct that is anything but nonviolent. U.S. Mot. for Recons., Ex. 5, at 2 (May 4, 2010) (respondent allegedly "slapped" the mother of his child "in the face," "[d]r[a]g[ged] [her] in the house and slapped [her] in the face again," "knocked" her "on the ground," "grabbed [her] neck," and "said he was going to kill [her] and run off with [the] baby"—all while she had "the baby in [her] arms").

fendant possesses only a small amount of marijuana * * * and that 'distribution' does not require remuneration"). Just as a noncitizen "would have to demonstrate that the State actually prosecutes the relevant offense in cases involving antique firearms," *id.* at 1693, respondent should have to demonstrate that Tennessee actually prosecutes misdemeanor domestic assault by intentionally causing bodily injury in cases involving a "paper cut" or a "stubbed toe."

B. The Intentional Causation Of Bodily Injury Requires The "Use" Of "Physical Force"

Respondent alternatively argues (Br. 35-42) that even if "violent" physical force is not required, assault by intentionally causing bodily injury still does not qualify as a "misdemeanor crime of domestic violence" because it does not require the "use" of *any* "physical force." The district court reached the same conclusion by relying principally on the term "physical force." Pet. App. 38a-41a. The court of appeals correctly rejected that reasoning (U.S. Br. 28), and respondent does not defend it. Respondent's alternative focus on the word "use," however, is equally unavailing.

1. In arguing that the intentional causation of bodily injury does not require the use of any physical force, respondent does not rely on the meaning of "physical force." As the government has explained, at common law "force" included "indirect[]" and "subtle" applications of force, such as administering a poison. U.S. Br. 29-30. And the common-law meaning of "force" fits comfortably within the "misdemeanor crime of domestic violence" definition. *Id.* at 31-32. Respondent does not dispute the common-law meaning of "force." Br. 40. And his only response to the government's argument that the Court should adopt

that meaning is a conclusory assertion that Section 922(g)(9) "*departs*" from the common law. *Ibid.* Congress, however, generally "incorporate[s] the well-settled meaning of the common-law terms it uses." *Sekhar* v. *United States*, 133 S. Ct. 2720, 2724 (2013) (citation omitted). And respondent (again) offers no reason to depart from that presumption here. See pp. 2-3, *supra*.

2. Respondent focuses instead on the word "use" in the context of the broader phrase "use of physical force." He argues (Br. 36-37) that the government's reading would "read the term 'use' out of the statute" by eliminating a requirement of direct or "active employment" of force. Respondent's claim is incorrect.

In *Leocal* v. *Ashcroft*, 543 U.S. 1, 9 (2004), the Court explained that the "use . . . of physical force against the person or property of another" requires "a higher degree of intent than negligent or merely accidental conduct." If, for example, a person "stumbl[ed]" and "f[e]ll" into his wife, "we would not ordinarily say" that he "use[d] . . . physical force." *Ibid.* But "a person would 'use . . . physical force against' another when pushing" his wife. *Ibid.* The word "use" in Section 921(a)(33)(A)(ii) plays the same role: it excludes offenses that require only "accidental or negligent conduct" and thereby requires the "intentional availment" or "active employ[ment]" of physical force. *Id.* at 9, 11 (emphasis omitted).

That requirement is readily met here. Respondent was convicted of "intentionally or knowingly" causing bodily injury. J.A. 27, 29. "Force" was not just "involved" in a passive sense (Resp. Br. 39); respondent necessarily "use[d]," or "active[ly] employ[ed]" "physical force" to accomplish his intended objective (*i.e.*, the causation of bodily injury). A person who intentionally sprinkles poison into his wife's iced tea has "actively employed" (*i.e.*, "used") the forceful physical properties of the poison, just as a person who punches his wife has "actively employed" (*i.e.*, "used") the forceful physical properties of his fist. In both instances, the defendant is "convert[ing]" to his "service" the forceful physical properties of the "thing used." *Id.* at 37 (citations omitted). The relevant contrast is between conduct that is active and intentional, as opposed to passive and accidental—not between direct and indirect action.[7]

Contrary to respondent's contention (Br. 37), a defendant's active employment of force, see *Bailey* v. *United States*, 516 U.S. 137, 143 (1995), does not demand that the defendant's conduct be examined in isolation from its intended results. In every case, a finding that a defendant intentionally caused bodily injury necessarily includes a finding that the defendant used (*i.e.*, actively employed) physical force. The use of physical force is therefore an "element" of intentional bodily-injury assault. Any other approach makes no sense in the context of a statute aimed at taking dangerous weapons out of the hands of persons whose convictions show that they pose a danger to their families. Respondent cannot explain why Congress would want to prohibit a husband who pushes his wife out a window from possessing a firearm, but not a husband who coerces his wife (without making physical contact) into jumping out that same window.

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[7] Respondent's arguments to the contrary assume that "trickery" and "force" (Br. 36) are mutually exclusive concepts. They are not. A husband who convinces his wife to walk in front of a moving vehicle may use "trickery," but he is also actively employing (*i.e.*, using) the forceful physical properties of the approaching car to cause her physical harm.

3. Respondent does not dispute that, under his interpretation, the crime of murder often would not have, as an element, the "use" of physical force because it would not require direct physical contact. U.S. Br. 33-34. He nevertheless finds no "anomal[y]" (Br. 41 (quoting U.S. Br. 11)) because murder is a felony and Section 922(g)(1) prohibits felons from possessing firearms. Respondent misses the point: his interpretation would exclude murder from the reach of other statutes that apply to felony offenses, require a use-of-force element, and do not contain any residual clause. See 18 U.S.C. 373(a), 521(c)(3); cf. 20 U.S.C. 1161w(b)(4), (f)(3)(A)(ii) and (4)(B); 28 U.S.C. 540A(a) and (c)(1).

For example, solicitation to commit a crime of violence under Section 373(a) applies only to "a felony that has as an element the use, attempted use, or threatened use of physical force against property or against the person of another." 18 U.S.C. 373(a). Contrary to respondent's assertion (Br. 41 n.15), that statute does not incorporate Section 16's "crime of violence" definition and it does not contain any independent residual clause. Many defendants have been prosecuted under 18 U.S.C. 373(a) for soliciting the commission of the quintessential violent crime—murder. See, *e.g.*, *United States* v. *Hinkson*, 585 F.3d 1247 (9th Cir. 2009), cert. denied, 131 S. Ct. 2096 (2011); *United States* v. *Stewart*, 420 F.3d 1007 (9th Cir. 2005). And, under respondent's interpretation of "use of physical force," all of those convictions were in error. That defies common sense.

C. Respondent's Interpretation Would Indisputably Render Section 922(g)(9) A Virtual Nullity At The Time Of Its Enactment And Today

Respondent acknowledges that, in enacting Section 922(g)(9), Congress intended to accomplish *something*—namely, to close a "dangerous loophole," to "keep[] firearms out of the hands of domestic abusers," and to "keep[] people who batter their wives * * * from having handguns." Br. 2-3 (citations omitted). What respondent does not (and cannot) explain is how any of those objectives could possibly be accomplished under his interpretation. Respondent's interpretation would indisputably render Section 922(g)(9) a virtual dead letter from the moment of its enactment and today. U.S. Br. 35-44. He offers three reasons why the Court should not be concerned about vitiating Section 922(g)(9)'s effect. None justifies respondent's position.

1. Respondent contends (Br. 52-54) that "[t]he government's concern about enforcement is overstated" because "several state misdemeanor domestic assault or battery statutes include use of violent force as an element" and others "may follow suit." The "several" States with statutes that purportedly meet respondent's preferred definition of "misdemeanor crime of domestic violence" total *six*: California, Colorado, Idaho, Iowa, Louisiana, and Utah. See Br. 52-53. The Court should not adopt an interpretation of Section 922(g)(9) that would have indisputably rendered it a virtual "dead letter" in the other 44 States and the District of Columbia. *Hayes*, 555 U.S. at 427 (rejecting interpretation of Section 922(g)(9) that would have rendered it a "dead letter" in "some two-thirds of the States") (citation omitted). And States

should not have to redefine their assault and battery laws in order to trigger Section 922(g)(9). Cf. *Descamps* v. *United States*, 133 S. Ct. 2276, 2293-2294 (2013) (Kennedy, J., concurring) ("This is an intrusive demand on the States.").

Respondent's reliance on those six States is largely misplaced in any event. When Section 922(g)(9) was enacted, Colorado did not have (and still does not have) a separate domestic assault or battery statute, and its generic misdemeanor assault statute prohibited the knowing causation of bodily injury. See Colo. Rev. Stat. Ann. § 18-3-204(1)(a) (West 1995).[8] California's misdemeanor battery and domestic violence statutes covered any "willful or unlawful use of force or violence upon the person of another," which includes "[a]ny harmful or offensive touching." Cal. Penal Code §§ 242, 243(e)(1) (West 1995); *People* v. *Pinholster*, 824 P.2d 571, 622 (Cal.) (brackets in original) (citation omitted), cert. denied, 506 U.S. 921 (1992).[9] Louisiana did not have a domestic assault or battery statute at the time of Section 922(g)(9)'s enactment. But its generic battery statute and its later-enacted "domestic abuse battery" statute define battery as "the intentional use of force or violence," which includes any "physical contact whether injurious or merely offensive.'" La. Rev. Stat. Ann. § 14:33 (1995); *id.* § 14:35.3(A) (Supp. 2013); *State* v. *Schenck*, 513 So. 2d 1159, 1165 (La. 1987) (citation omitted).

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[8] The two definitions of "domestic violence" and "domestic abuse" respondent cites (Br. 52) govern sentencing (among other things) and civil protection orders, respectively. Neither defines a criminal offense that could give rise to a predicate conviction under Section 922(g)(9).

[9] The definition of "domestic violence" respondent cites (Br. 52) applies only to the family code, not the criminal code, which generally governs protection orders. See Cal. Fam. Code § 6201 (West 2013).

The Idaho and Utah statutes also defined misdemeanor assault or battery (generic and domestic) to include, *inter alia*, the unlawful use of "force or violence." See Idaho Code Ann. § 18-903 (West 1995) (generic battery); *id.* § 18-918(3) (domestic battery); Utah Code Ann. § 76-5-102(1)(c) (West 1995) (generic assault); *id.* § 77-36-1(2) (domestic-violence sentencing enhancement). Because, unlike California and Louisiana, there is no authoritative interpretation of what constitutes "force or violence" under the respective statutes, the government classified them as "miscellaneous." See U.S. Br. App. B-D. But it is not at all clear that a conviction under those statutes would constitute a misdemeanor crime of domestic violence under respondent's interpretation, which requires the use of force *and* violence (*i.e.*, violent force), not "force *or* violence."

That leaves respondent's assertion that "[o]ther States have created 'aggravated misdemeanor' offenses, which *may* capture people who commit violent assaults but plead down to misdemeanors." Br. 53 (emphasis added). But the only statute respondent identifies is an Iowa statute that criminalizes domestic abuse by strangulation or suffocation—and that statute was not enacted until 2012. *Ibid.* (citing Iowa Code Ann. § 708.2A(2)(d) (West Supp. 2013)); see NACDL Amicus Br. 8 (citing two similar "specific conduct" statutes).[10] The suggestion that States would have to pass this "type of statute" to satisfy the "use of physical force" requirement proves the government's point. Congress intended to disarm domestic abusers nationwide, not only those abusers who choose to harm their victims by cutting off their air supply.

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[10] NACDL also cites a New Mexico statute criminalizing a broader range of conduct as "aggravated battery against a house-

2. Respondent also suggests (Br. 50-51) that "there will not be 100,000 more potential abusers in possession of firearms" because "[m]any state laws bar domestic abusers from acquiring firearms." That is factually inaccurate and legally irrelevant.

Respondent identifies "thirty-three States" that purportedly bar domestic abusers from possessing a firearm. See Br. 51 & App. A, B. By respondent's own count, the vast majority of those States prohibit firearm possession only when the domestic abuser is subject to a civil protective order. Compare Br. App. A, with Br. App. B; see also N.H. Rev. Stat. Ann. § 173-B:5(I) (Supp. 2013) (incorrectly listed in Appendix A). Those state laws are analogous to the federal firearm prohibition in Section 922(g)(8), not Section 922(g)(9). Federal denials of firearm purchases based on a civil protection order are separately counted and are excluded from the more than 100,000 federal denials referenced in the government's opening brief (U.S. Br. 43)—they accounted for an additional 42,459 federal denials during the same time period. See Federal Bureau of Investigation, *National Instant Background Check System (NICS) Operations 2012*, http://www.fbi.gov/about-us/cjis/nics/reports/2012-operations-report (last visited Jan. 7, 2014).

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hold member" that is punishable as a misdemeanor. See Amicus Br. 7-8 (citing N.M. Stat. Ann. § 30-3-16 (Supp. 2013)).

Of the States respondent identifies as prohibiting firearm possession by those convicted of domestic-violence offenses, few are comparable to Section 922(g)(9)—and most postdate the statute's enactment.[11] For example, Arizona's prohibition applies only during the "term of probation." Ariz. Rev. Stat. Ann. § 13-3101(A)(7)(d) (Supp. 2013). Delaware and Texas law is time limited. Del. Code Ann. title 11, § 1448(a)(7) (Supp. 2012); *id.* § 1448(d) (2007) (five years after date of conviction); Tex. Penal Code § 46.04(b) (West 2011) (five years after release from confinement or supervision). And Minnesota and Montana only prohibit possession if the firearm was actually used to commit the crime. Minn. Stat. Ann. § 609.2242(3)(b) (West 2009); Mont. Code Ann. § 45-5-206(7) (2013).

In any event, Congress plainly was not content to rely on a handful of (not yet enacted) state laws to fill what it perceived to be a "dangerous loophole" in federal law. Nor did it find the Section 922(g)(8) prohibition, which is temporary in nature and had been enacted two years prior, sufficient to keep guns out of the hands of domestic abusers. See Brady Center Amicus Br. 17-21; NNEDV Amicus Br. 20, 22-23. Even if "many" States had followed Congress's lead and enacted comparable firearm prohibitions (and they have not), that would provide no reason to nullify Congress's clear intent to enact a comprehensive federal prohibition with independent effect.

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[11] Notably, the state firearm prohibitions listed in Appendix A of respondent's brief define the predicate domestic-violence convictions to include the very assault and battery statutes respondent would exclude from the reach of Section 922(g)(9). See, *e.g.*, Ariz. Rev. Stat. Ann. §§ 13-1203(A) (2010); *id.* § 13-3101(A)(7)(d) (Supp. 2013); Del. Code Ann. title 11, § 601 (2007); *id.* § 1448(a)(7) (Supp. 2012). Indeed, if convicted today, respondent's offense (domestic assault) would disqualify him from possessing a firearm under Tennessee law. See Tenn. Code Ann. §§ 39-13-111(c)(6), 13-17-1307(f) (Supp. 2013).

3. Respondent falls back on (Br. 44-50) the "modified categorical approach." He does not dispute that the modified categorical approach will do nothing to mitigate the practical effect of his interpretation. U.S. Br. 41-43. Respondent instead argues (Br. 44) that confusion about the modified categorical approach at the time of Section 922(g)(9)'s enactment may have misled Congress into (wrongly) "believ[ing]" that courts could "look at the facts of predicate convictions" and "apply the firearms ban to persons who in fact engaged in domestic violence." That theory offers respondent no help here.

This Court has adopted (or rejected) a "formal categorical approach" and its "modified categorical" variant as a matter of statutory interpretation. See *Descamps*, 133 S. Ct. at 2282, 2287; *Nijhawan* v. *Holder*, 557 U.S. 29, 36-40 (2009); *Shepard* v. *United States*, 544 U.S. 13, 23 (2005); *Taylor* v. *United States*, 495 U.S. 575, 599-602 (1990). If the enacting Congress had wanted courts "to look at the facts of predicate convictions" under Section 922(g)(9) (Resp. Br. 44), then that is precisely what courts should do. Respondent, of course, disclaims that interpretation (Br. 50)—and this Court has rejected it as well. See *Hayes*, 555 U.S. at 421 ("the use of force" is "undoubtedly a required element"). But respondent cannot have it both ways. Either Congress adopted a fact-based approach that would allow courts to apply Section 922(g)(9) "to persons who in fact engaged in domestic violence." Resp. Br. 44. Or Congress adopted an element-based approach that (under respondent's reading) effectively renders Section 922(g)(9) a nullity. Because Congress could not have been surprised when courts dutifully applied the very categorical approach it enacted, and because Congress intended Section 922(g)(9) to have some meaningful effect, respondent's interpretation fails.

D. There Is No Reason To Resort To The Rule Of Lenity

1. The rule of lenity applies only "if, after considering text, structure, history, and purpose, there remains a grievous ambiguity or uncertainty in the statute such that the Court must simply guess as to what Congress intended." *Maracich* v. *Spears*, 133 S. Ct. 2191, 2209 (2013) (citation omitted). A statute does not have a "grievous ambiguity" simply because it could "have been more meticulously drafted," *Abbott* v. *United States*, 131 S. Ct. 18, 31 n.9 (2010), because it "is not a model of the careful drafter's art," *Hayes*, 555 U.S. at 429, or because courts have disagreed as to its meaning, *Reno* v. *Koray*, 515 U.S. 50, 64-65 (1995).

There is no grievous ambiguity here. Section 922(g)(9) tracks common-law battery, and the common-law meaning of "force" readily encompasses both the slightest offensive touching and indirect uses of force. Respondent's interpretation departs from the common law without justification and "reflects 'an implausible reading of the congressional purpose.'" *Abbott*, 131 S. Ct. at 31 n.9 (citation omitted). "The text, context, purpose, and what little there is of drafting history all point in the same direction" (*Hayes*, 555 U.S. at 429): Congress intended to disarm domestic abusers convicted of intentionally or knowingly causing bodily injury to a family member.

2. Respondent also makes (Br. 28-30) a case-specific appeal to "fair warning." The Court's interpretation, however, will apply nationwide—not just to the idiosyncratic facts of this case. In any event, respondent unsuccessfully sought post-conviction relief based on the Tennessee court's purported failure to warn him of the federal firearm prohibition before pleading guilty to domestic assault. See *State* v. *Castleman*, No. W2009-1661, 2010 WL 2219543 (Tenn. Crim. App. May 27, 2010), cert. denied, 131 S. Ct. 2964 (2011). Federal law required no such warning. Cf. *United States* v. *Mitchell*, 209 F.3d 319, 322, 323-324 (4th Cir.) (defendant's "conduct in assaulting his wife" provides "sufficient notice"), cert. denied, 531 U.S. 849 (2000); *Lewis* v. *United States*, 445 U.S. 55, 60-65 (1980) (foreclosing belated collateral attacks). And few people would be surprised to learn that a conviction for "misdemeanor domestic assault" constitutes a "misdemeanor crime of domestic violence."

* * * * *

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

—v.—

JAMES ALVIN CASTLEMAN,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR *AMICI CURIAE* ASISTA IMMIGRATION ASSISTANCE, THE IMMIGRANT DEFENSE PROJECT, THE IMMIGRANT LEGAL RESOURCE CENTER, THE NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD, AND THE WASHINGTON DEFENDER ASSOCIATION IN SUPPORT OF RESPONDENT

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INTERESTS OF *AMICI CURIAE*[1]

ASISTA Immigration Assistance (ASISTA) worked with Congress to create and expand routes to secure immigration status for survivors of domestic violence, sexual assault, and other crimes, which were incorporated in the 1994 Violence Against Women Act (VAWA) and its progeny. ASISTA serves as liaison for the field with Department of Homeland Security (DHS) personnel charged with implementing these laws, most notably Citizenship and Immigration Services (CIS), Immigration and Customs Enforcement (ICE), and DHS's Office for Civil Rights and Civil Liberties. ASISTA also trains and provides technical support to local law enforcement officials, civil and criminal court judges, domestic violence and sexual assault advocates, and legal services, non-profit, pro bono, and private attorneys working with immigrant crime survivors. ASISTA has previously filed amicus briefs in the Second, Seventh, Eighth, and Ninth Circuits. See *Rosario v. Holder*, 627 F.3d 58 (2d Cir. 2010); *Sanchez v. Keisler*, 505 F.3d 641 (7th Cir. 2007); *Torres-Tristan v. Holder*, 656 F.3d 653 (7th Cir. 2011); *L.D.G. v. Holder*, No. 13-1011 (7th Cir.) (pending case); *Leiva-Mendoza v. Holder*, No. 10-1058 (8th Cir.) (remanded to BIA); *Lopez-Birrueta v.*

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[1] Pursuant to Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party authored this brief in whole or in part and that no person other than amici, their members, and their counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of this brief have been filed with the Clerk.

Holder, 633 F.3d 1211 (9th Cir. 2011); *Rusello v. Holder*, No. 11-71013 (9th Cir.) (pending case).

The Immigrant Defense Project (IDP) is a not-for-profit legal resource and training center that provides defense attorneys, immigration attorneys, and immigrants with expert legal advice, publications, and training on issues involving the interplay between criminal and immigration law. IDP is dedicated to promoting fundamental fairness for immigrants accused of crimes, and therefore has a keen interest in ensuring the correct interpretation of laws that may impact the rights of immigrants at risk of detention and deportation based on past criminal charges. This Court has accepted and relied on *amicus curiae* briefs submitted by IDP in key cases involving the interplay between criminal and immigration law, including *Carachuri-Rosendo v. Holder*, 560 U.S. 563 (2010); *Padilla v. Kentucky*, 559 U.S. 356 (2010); *Lopez v. Gonzales*, 549 U.S. 47 (2006); *Leocal v. Ashcroft*, 543 U.S. 1 (2004); and *INS v. St. Cyr*, 533 U.S. 289 (2001) (brief cited at 322-23).

The Immigrant Legal Resource Center (ILRC) is a national non-profit back-up center located in San Francisco, California. The ILRC is a national leader in the area of the immigration consequences of crimes, as well as in advocating for the rights of battered immigrant women. The ILRC has provided information and assistance to thousands of immigration advocates, criminal defenders, courts, advocates for battered women, and other groups on these issues, and advocated for positive policy changes. The ILRC publishes manuals on these subjects, including Evangeline Abriel and Sally

Kinoshita, *The VAWA Manual: Immigration Relief for Abused Immigrants* (5th ed. 2008), and Kathy Brady et al., *Defending Immigrants in the Ninth Circuit: Impact of Crimes under California and Other State Laws* (10th ed. and 2013 update). The ILRC has previously filed *amicus* briefs in this Court; examples include *Carachuri-Rosendo v. Holder*, 560 U.S. 563 (2010), *Padilla v. Kentucky*, 559 U.S. 356, 364 (2010), and *Lopez v. Gonzales*, 549 U.S. 47 (2006).

The National Immigration Project of the National Lawyers Guild (National Immigration Project) is a non-profit membership organization of immigration attorneys, legal workers, grassroots advocates, and others working to defend immigrants' rights and secure a fair administration of the immigration and nationality laws. The National Immigration Project provides legal training to the bar and the bench on immigration consequences of criminal conduct and implementation of the Violence Against Women Act. It is also the author of *Immigration Law and Crimes* (2013-2 ed.) and three other treatises published by Thomson-West. The National Immigration Project has participated as *amicus curiae* in several significant immigration-related cases before the Supreme Court, Circuit Courts of Appeals, and Board of Immigration Appeals.

The Washington Defender Association (WDA) is a statewide non-profit organization whose membership is comprised of public defender agencies, indigent defenders, and those who are working to improve the quality of indigent defense in

Washington State. The purpose of WDA, as stated in its bylaws, is to "to protect and insure by rule of law those individual rights guaranteed by the Washington and Federal Constitutions, including the right to counsel, and to resist all efforts made to curtail such rights and to promote, assist, and encourage public defense systems to ensure that all accused persons receive effective assistance of counsel." In 1999, WDA created the Immigration Project to defend and advance the rights of noncitizens within the Washington State criminal justice system and noncitizens facing the immigration consequences of crimes. Since its inception, WDA's Immigration Project has consulted in over 20,000 individual criminal cases by assisting defenders, prosecutors, and courts to understand and, where appropriate, mitigate the immigration consequences of criminal convictions. These 20,000 cases include countless defendants who relied on the WDA Immigration Project's analysis that assault in the fourth degree under Wash. Rev. Code § 9A.36.041 does not constitute a "crime of violence" for immigration purposes. Additionally, WDA's Immigration Project has been party to numerous *amicus* briefs before this Court, the U.S. Court of Appeals for the Ninth Circuit, the Board of Immigration Appeals, as well as the appellate courts in Washington State.

BACKGROUND

Amici have expertise at the intersection of criminal and immigration law as they affect immigrant domestic violence survivors.[2] This brief respectfully emphasizes to the Court that a ruling reversing the Court of Appeals based on a broad reading of "misdemeanor crime of domestic violence" could have profound effects on immigration law. These include the unintended consequences of hurting immigrant domestic violence survivors who get swept into the criminal justice system, as well as their family members, and stifling the vital reporting of domestic abuse.

While Congress' goal of taking guns out of the hands of those who commit domestic violence is laudable, a broad reading of the statute could have unintended consequences for domestic violence survivors. The Court should not depart from its holdings addressing nearly identical statutory language to achieve a result that cannot be squared with precedent or 18 U.S.C. § 922(g)(9)'s plain meaning. This is especially true given the absence of any indication that Congress intended to impose harsh immigration consequences when it restricted gun possession by domestic violence misdemeanants.

SUMMARY OF ARGUMENT

In *Johnson v. United States*, 559 U.S. 133 (2010), and *Leocal v. Ashcroft*, 543 U.S. 1 (2004), the

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[2] *Amici* use the terms "victim" and "survivor" interchangeably. While law enforcement generally frames those who suffer domestic violence as "victims," many of those who have undergone abuse consider themselves survivors of violence, and view "victim" as a pejorative term, indicating passivity. "Survivor" acknowledges the great strength it takes to successfully leave abuse and establish a new life despite the trauma endured.

Court construed statutory language almost identical to that presented here. As the Court of Appeals' decision faithfully followed these precedents, it should be affirmed.

The similarity between 18 U.S.C. § 922(g)(9), the statutory provision at issue in this case, and the previously construed provisions in *Johnson* and *Leocal* implicates the interpretation of immigration law deportation grounds based on "crimes of violence" and "crimes of domestic violence." Should the Court adopt the broad reading of "misdemeanor crime of domestic violence" urged by the government, the impact on immigration detention, deportation, and family unity could be staggering. If the Court departs from its traditional tools of statutory construction in this case, the same wide range of misdemeanor convictions to which the government seeks to attach section 922(g)(9)'s firearms prohibition could become the basis for deporting long-term residents of the United States for offenses deemed minor by the criminal justice system. This would have a calamitous impact on some of their families (which include U.S. citizen children).

Moreover, because immigrant domestic violence survivors themselves get swept into the criminal justice and deportation systems – sometimes when batterers use arrests as a tactic of control – an overbroad statutory reading in this case could hurt some of the same survivors Congress intended to protect. *See, e.g.,* Anthony Lewis, *The Mills of Cruelty*, NEW YORK TIMES, Dec. 14, 1999 ("[F]or biting an abusive husband during a domestic dispute, Ms. Flores is to be deported."). There is a complexity to domestic violence prosecutions and convictions that fails to be captured by a binary opposition of victim and convict. *Cf. United States v. Booker*, 644 F.3d 12, 20–21 (1st Cir. 2011) ("§ 922(g)(9) addresses an acute risk to an identifiable class of victims—those in a relationship with a perpetrator of domestic violence").

Victim reporting of abuse would also suffer if the Court defines "misdemeanor crime of domestic violence" overbroadly and allows even state convictions covering nonviolent conduct to have detention, deportation, and other adverse immigration consequences. Immigrant survivors who depend on financial support from a perpetrator of domestic violence, for example, will face dire circumstances if their family's livelihood is put at risk by any misdemeanor conviction falling under the government's broad umbrella definition. Such considerations have been shown to influence greatly a survivor's crucial decision of whether to seek help at all.

Although *Amici* support restricting past abusers from firearms possession, this brief respectfully suggests that the Court decline to do so by stretching the definition of a "misdemeanor crime of domestic violence" beyond its plain meaning and thus potentially triggering unintended consequences relating to similarly phrased or defined provisions in other areas, such as immigration law. Affirmance would return the matter for Congress to consider anew, using the normal process of public input that accompanies statutory change, and would ensure that any consequences of amendment are intentional.

ARGUMENT

For the reasons detailed below in Point II, the government's reading of section 922(g)(9) could lead to immigration effects with adverse consequences for many of the very domestic violence survivors the provision sought to protect. The Court should avoid such unintended consequences and interpret the "misdemeanor crime of domestic violence" term at issue here consistently with the Court's readings of other similarly defined violent crime provisions.

I. The Court should follow *Johnson* and *Leocal* to affirm the Court of Appeals and thereby avoid the deleterious effects an overbroad reading of "misdemeanor crime of domestic violence" would have for immigration law.

Based on *Johnson* and *Leocal*, the Court should reject the government's invitation to ignore the language chosen by Congress in section 922(g)(9). *See* Opening Brief, 19 ("Congress could have just as easily chosen to prohibit the possession of firearms by those convicted of 'misdemeanor crime(s) of domestic abuse.'"). Congress' use of "violence" in section 922(g)(9) should not be shunted aside on policy grounds. Moreover, the Court should be aware that the government's attempt to downplay the burden on individuals of section 922(g)(9)'s firearms restriction sidesteps the potential serious immigration law consequences of broadly reading "misdemeanor crime of domestic violence."

A. The statutory provisions reviewed in *Johnson* and *Leocal* are virtually identical to section 922(g)(9), and the Court should affirm based on these precedents.

The Fourth Circuit correctly encapsulated the core of this case:

> We see little, if any, distinction between the "physical force" element in a "crime of violence" in § 16 under *Leocal*, a "violent felony" under § 924(e) in *Johnson* and a "misdemeanor crime of domestic violence" in § 922(g)(9) in the case at bar. All these statutes describe an act of "violence" and require the identical element of that violent act to include "physical force." A "crime of violence" is a "violent, active crime" and a "violent felony" requires "violent force." We see no principled basis upon which to say a "crime of domestic violence" would include nonviolent force such as offensive touching in a common law battery.

United States v. White, 606 F.3d 144, 153 (4th Cir. 2010).

Section 922(g)(9) prohibits firearms possession by persons convicted of a "misdemeanor crime of domestic violence." This term is defined in section 921(a)(33)(A)(ii), in pertinent part, as an offense that "has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon." In *Johnson*, the Court addressed the meaning of "physical force" in the definition of the term "violent felony" in § 924(e)(2)(B)(i), which defines such a felony as one that "has as an element the use, attempted use, or threatened use of physical force against the person of another." In *Leocal*, the Court, *inter alia*, interpreted 18 U.S.C. § 16(a), which defines a "crime of violence" as "any offense that has as an element the use or attempted use or threatened use of physical force against the person or property of another."

The Court in *Leocal* established the principle, followed in *Johnson*, that "[t]he ordinary meaning of this term ['crime of violence'], combined with § 16's emphasis on the use of physical force against another person (or the risk of having to use such force in committing a crime), suggests a category of violent, active crimes." 543 U.S. at 11; *see also Johnson*, 559 U.S. 133, 140, 142 (2010) ("'physical force' as used in section 924(e)(2)(B)(i) means 'violent force' . . . force strong enough to constitute 'power'").

The government suggests that the Court place undue emphasis on the "misdemeanor" component of section 922(g)(9), and distinguish away the "crime of domestic violence" component as not reflecting Congress' true intent to sweep in all crimes of "abuse." Yet after enacting this provision on July 8, 1996, Congress two months later enacted the Illegal Immigration Reform and Immigrant Responsibility Act containing a new deportation ground for crimes of domestic violence, *see* 8 U.S.C. § 1227(a)(2)(E)(i), with a definitional cross-reference to 18 U.S.C. § 16. While the Court could explicitly limit its holding to section 922(g)(9), distinguishing *Leocal* and the term "crime of violence" in the immigration law context, the more natural and consistent reading of section 922(g)(9) is that its parallel statutory language of "force" has the same "violent" meaning in both contexts.

B. The Court should not adopt a reading of section 922(g)(9) that could carry with it severe immigration law consequences.

The government attempts to downplay the consequences of reading section 922(g)(9) broadly. For example, noting the ACCA's severe recidivist sentencing enhancement, the government sees "[s]ection 922(g)(9) [as] different in kind and in degree. It prohibits a class of persons thought to pose a heightened risk of danger (those with convictions for misdemeanor crimes of domestic violence) from possessing a firearm." Opening Brief, 20. Yet whereas the government urged the Court in its *Johnson* briefing not to adopt a reading of "misdemeanor crime of domestic violence" that would restrict "the domestic-violence provisions of immigration law," *Johnson*, Respondent's Brief, 41, the government makes no mention in this case of the breadth of deportation consequences that would result from the Court's adoption of its reading.

In fact, if the Court were to read section 922(g)(9) to encompass non-violent force without a clear limitation precluding application of that holding in the immigration law context, a sea change to the deportation law of "crimes of domestic violence" could ensue. Several of the Courts of Appeals that have interpreted section 922(g)(9) use their criminal-law precedents addressing that provision to inform their interpretation of the "crime of domestic violence" deportation ground. *See Mondragon v. Holder*, 706 F.3d 535, 547 (4th Cir. 2013) ("Mondragón was convicted of Virginia assault and battery, the elements of which are broad and allow for the possibility that Mondragón was convicted of either a crime of violence or a crime of nonviolence. *See United States v. White*, 606 F.3d 144, 148–49 (4th Cir. 2010) [interpreting section 922(g)(9)]."); *Hernandez v. U.S. Att'y Gen.*, 513 F.3d 1336, 1340 (11th Cir. 2008) ("Although not an immigration case, [*United States v. Griffith*, 455 F.3d 1339 (11th Cir. 2006)] is relevant here because a 'crime of domestic violence' for purposes of § 922(g)(9) is defined to include an offense, inter alia, that '(ii) has, as an element, the use or attempted use of physical force.' 18 U.S.C. § 921(a)(33)(A). This is essentially the same definition of a 'crime of violence' as in 18 U.S.C. § 16(a), the immigration statute at issue here."); *Ortega-Mendez v. Gonzales*, 450 F.3d 1010, 1018 (9th Cir. 2006) ("The result we reach [interpreting 'crime of domestic violence' under 8 U.S.C. § 1227(a)(2)(E)(i)] is consonant with this and other courts' holdings regarding whether materially similar battery offenses under other statutes are 'crimes of violence' within the meaning of § 16(a) and other similar statutory provisions.").

In addition, the Board of Immigration Appeals has also applied the *Johnson* framework to misdemeanor "crimes of domestic violence," noting that "[h]ad the Supreme Court determined that its ruling in *Johnson* did not apply outside the context of the ACCA, it could have responded to the Government's specific arguments regarding immigration cases, and to those of the dissent, by so limiting its ruling." *Matter of Velasquez*, 25 I. & N. Dec. 278, 282-83 (BIA 2010).

The prospective consequences for immigration law of a broad reading of "misdemeanor crime of domestic violence" would be compounded by retroactive effects upsetting plea agreements thought to avoid collateral deportation. *Cf. Padilla v. Kentucky*, 559 U.S. 356, 364 (2010) ("[A]s a matter of federal law, deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes." (footnote omitted)). The Court expressed concern about undoing such negotiated agreements in *Descamps v. United States*, 133 S. Ct. 2276, 2289 (2013), quoting *Taylor v. United States*, 495 U.S. 575, 601-02 (1990): "'[I]f a guilty plea to a lesser, nonburglary offense was the result of a plea bargain,' [*Taylor*] stated, 'it would seem unfair to impose a sentence enhancement as if the defendant had pleaded guilty' to generic burglary. That way of proceeding, on top of everything else, would allow a later sentencing court to rewrite the parties' bargain." *Amici* estimate that a substantial number of criminal pleas have been taken in reliance on case-law and expert opinion that a conviction for an offense whose minimum conduct includes the common-law battery of an offensive or unconsented touch is not a crime of violence under 18 U.S.C. § 16. *See, e.g.*, Dan Kesselbrenner & Lory Rosenberg, *Immigration Law and Crimes* (2013-2 ed.), § 2.23 (describing BIA view that simple battery is "not categorically a crime of violence under 18 U.S.C.A. § 16(a) and therefore not categorically a crime of domestic violence under INA § 237(a)(2)(E)(i)," relying on *Johnson*); Immigrant Defense Project, *Representing Immigrant Defendants in New York* (5th ed. 2011), A-4 (stating in Appendix A, "Quick Reference Chart for Determining Immigration Consequences of Common New York Offenses" that under *Chrzanoski v. Ashcroft*, 327 F.3d 188 (2d Cir. 2003), "even intentional infliction of injury does not equal the intentional use of force required for crime of violence [aggravated felony] definition under 18 USC 16(a)").

The Court's interpretation of section 922(g)(9) would, therefore, cast a long and foreboding shadow onto immigration law if the government's position is accepted. As the Court is well aware, "deportation is a drastic measure and at times the equivalent of banishment or exile. It is the forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty. To construe this statutory provision less generously to the alien might find support in logic. But since the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used." *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948).

C. The government's reliance on *Duenas-Alvarez* is misplaced, as in this case the plain language of Tennessee's indivisible misdemeanor domestic assault statute makes it broader than the generic offense.

In *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007), the Court addressed whether a California vehicle-theft statute was overbroad for aggravated felony purposes under immigration law. The respondent in that case did not argue that the plain language of the statute took it out of the realm of generic theft offenses. Instead, Duenas-Alvarez contended that California case law had interpreted the statute in ways that might allow for convictions that do not match the generic requirements for a theft offense. In rejecting Duenas-Alvarez's position on judicial interpretations of the California statute, the Court held that:

> [T]o find that a state statute creates a crime outside the generic definition of a listed crime in a federal statute requires more than the application of legal imagination to a state statute's language. It requires a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime. To show that realistic possibility, an offender, of course, may show that the statute was so applied in his own case. But he must at least point to his own case or other cases in which the state courts in fact did apply the statute in the special (nongeneric) manner for which he argues.
>
> Because Duenas-Alvarez makes no such showing here, we cannot find that California's statute, *through the California courts' application of a "natural and probable consequences" doctrine*, creates a subspecies of the

> Vehicle Code section crime that falls outside the generic definition of "theft."

549 U.S. at 193 (emphasis added). This is a completely different scenario from Respondent's, as his Tennessee statute of conviction is overbroad on its face, without regard to judicial interpretation. The difference lies between whether particular factual conduct is covered by a statute of conviction as a result of statutory interpretation by the courts (as in *Duenas-Alvarez*), as opposed to whether the language of a statute, by itself, creates a non-generic offense. *See United States v. Grisel*, 488 F.3d 844, 850 (9th Cir. 2007) (en banc) ("Where, as here, a state statute explicitly defines a crime more broadly than the generic definition, no 'legal imagination,' [under] *Duenas-Alvarez*[,] is required to hold that a realistic probability exists that the state will apply its statute to conduct that falls outside the generic definition of the crime. The state statute's greater breadth is evident from its text." (citation omitted)).

When a statute's plain language is overbroad, a "realistic possibility" of application is automatic. *See Ramos v. U.S. Att'y Gen.*, 709 F.3d 1066, 1071-72 (11th Cir. 2013) ("*Duenas-Alvarez* does not require this showing when the statutory language itself, rather than 'the application of legal imagination' to that language, creates the 'realistic probability' that a state would apply the statute to conduct beyond the generic definition."). Tenn. Code Ann. § 39-13-111(B) reaches nonviolent physical force, which takes it outside the generic offense defined in section 921(a)(33)(A)(ii). *Cf. Johnson*, 559 U.S. at 143 ("Specifying that 'physical force' must rise to the level of bodily injury does not suggest that without the qualification 'physical force' would consist of the merest touch. It might consist, for example, of only that degree of force necessary to inflict pain—a slap in the face, for example."). The Court need not, therefore, engage in a *Duenas-Alvarez* analysis.

II. An overbroad definition of domestic violence would hurt immigrant survivors and their family members who get swept into the criminal justice system.

Current immigration law already metes out harsh consequences to those who commit serious crimes – including domestic violence-related offenses. For the reasons discussed below, expanding the scope of domestic violence crimes considered "crimes of violence" could unnecessarily and imprudently increase the likelihood of these harsh immigration consequences in domestic violence cases, including for the domestic violence survivor and her family members.

A. Survivors face a significant risk of being convicted for domestic violence.

The majority of women who are arrested for domestic violence are survivors of ongoing abuse.[3] They may have used violence in retaliation or in self-defense.[4] In other cases, domestic violence survivors may be arrested without having used violence at all, because their abusers were successful in manipulating law enforcement by lying about the survivors' use of violence in order to get them arrested, a recognized part of the pattern of domestic violence.[5]

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[3] Shoshana Pollack et al., *Women charged with domestic violence in Toronto: The unintended consequences of mandatory charge policies* 7-9 (2005).

> Today, more male batterers are alleging claims of self-defense earlier: with the 911 call and at the scene. It seems we have trained our batterers well. . . . "The jail cell is a great class room." Batterers are savvier about the laws. They have learned that calling 911 first to "tell their story" may help them avoid being held accountable. They have found that it helps to retaliate against the victim for previous police calls because the victims naturally become reluctant to make further calls to the police.[6]

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[4] *Id.*; Gregory L. Stuart et al., *Reasons for Intimate Partner Violence Perpetration Among Arrested Women*, 12 Violence Against Women 609 (2006).

[5] *See* William DeLeon-Granados et al., *Arresting developments: Trends in female arrests for domestic violence and proposed explanations*, 12 Violence Against Women 355 (2006); *see also* Meg Crager et al., *Victim-Defendants: An Emerging Challenge in Responding to Domestic Violence in Seattle and the King County Region* (2003).

[6] Gael B. Strack, *"She hit me, too" Identifying the Primary Aggressor: A Prosecutor's Perspective* 3, 5, *available at* http://www.ncdsv.org/images/she_hit_me.pdf; Susan L. Miller, *The Paradox of Women Arrested for Domestic Violence:*

The consequences of arrest for domestic violence survivors can be dire.[7] Abusers' coercive behavior is reinforced; they feel rewarded and invincible; victims "think twice" before calling the police and continue to live in fear; children learn to distrust the police, especially when both parents are removed; law enforcement is frustrated and batterers are not held accountable.[8] If convicted (or if they plead), domestic violence survivors may be unable to gain or retain custody of their children, jobs, and housing.[9]

B. Immigrant survivors are at least as likely as citizen survivors to be convicted, and they then become subject to removal.

Senator Edward M. Kennedy, who shepherded the original and subsequent Violence Against Women Acts (VAWA), opined on the immigration provisions of VAWA's 2005 reauthorization:

> Eliminating domestic violence is

Criminal Justice Professionals and Service Providers Respond, 7 Violence Against Women 1339, 1351–63 (2001).

[7] Melissa E. Dichter, *"They Arrested Me—And I Was the Victim": Women's Experiences With Getting Arrested in the Context of Domestic Violence*, 23 Women & Criminal Justice 81 (2013).

[8] Strack, *supra* note 6, at 5.

[9] National Clearinghouse for the Defense of Battered Women, *The Impact of Arrests and Convictions on Battered Women* 1-2 (2008), *available at* http://www.biscmi.org/wshh/NCDBW_%20Impact_of_Arrest.pdf; David Hirschel & Eve Buzawa, *Understanding the Context of Dual Arrest with Directions for Future Research*, 8 Violence Against Women 1449, 1459 (2002).

> especially challenging in immigrant communities, since victims often face additional cultural, linguistic and immigration barriers to their safety. Abusers of immigrant spouses or children are liable to use threats of deportation to trap them in endless years of violence.

151 Cong. Rec. S13749, 13753 (daily ed. Dec. 16, 2005) (statement of Sen. Kennedy).

As noted above in Point II(A), all victims of domestic violence face some risk of being arrested and convicted if they report the abuse to law enforcement.[10] Immigrant victims are particularly vulnerable to being arrested and prosecuted for domestic violence, even when they are not the primary perpetrator of violence in the relationship, due to the cultural, linguistic and immigration barriers referenced by Senator Kennedy.

The case of Isaura Garcia, an immigrant living in Los Angeles, illustrates this problem. Ms. Garcia, who was undocumented, "called 911 in February [of 2011] to report an alleged beating by her partner." The police arrested both parties and fingerprinted Isaura. Because of the Secure Communities program, immigration officials obtained her fingerprints and flagged her for removal, even though she had no criminal record.[11]

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[10] *See* John Johnson, *A New Side to Domestic Violence; Arrests of Women Have Risen Sharply Since Passage of Tougher Laws*, L.A. TIMES, April 27, 1996, *available at* http://articles.latimes.com/1996-04-27/news/mn-63362_1_domestic-violence.

Responding to and communicating with police on the scene may be difficult for a variety of reasons.[12] For example,

> Frequently, officers dispatched to domestic violence calls within Latin American neighborhoods speak only English. If the batterer/husband speaks more English than the wife, his version of the incident is more likely to be accepted on his wife's behalf. Indeed, often the Spanish-speaking Latina is literally speechless because she cannot communicate with the police officer. [13]
>
> For immigrant survivors, in addition to language barriers, cultural barriers, fear of the abuser and the authorities, confusion, intimidation, lack of

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[11] Editorial, *Secure Communities Program: A Flawed Deportation Tool*, L.A. TIMES, May 23, 2011, *available at* http://articles.latimes.com/2011/may/23/opinion/la-ed-secure-20110523.

[12] Mary Haviland et al., *The Family Protection and Domestic Violence Intervention Act of 1995: Examining the effects of mandatory arrest in New York City* (2001), *available at* http://www.urbanjustice.org/pdf/publications/FamilyViolence/fvpreport.pdf.

[13] Guadalupe T. Vidales, *Arrested Justice: The Multifaceted Plight of Immigrant Latinas who Faced Domestic Violence*, 25 Journal of Family Violence 533, 539 (2010); Zelda B. Harris, *The Predicament of the Immigrant Victim/Defendant: "VAWA Diversion" and Other Considerations in Support of Battered Women*, 14 Hastings Women's L.J. 1, 13-14 (2003).

> awareness of rights, and a lack of access to advocates and other resources pose additional barriers to communicating effectively with law enforcement.[14]

Once in custody and/or facing trial, survivors are often desperate to be released and reunited with their children, who may have been placed with their abusers in their absence.[15] They may accept pleas because they are urged to do so by counsel unaware of the consequences, because the abuser's violence escalates during protracted trials, or because they face prolonged separation from children and work during custody and trial.[16]

Like other domestic violence survivors, immigrants who accept pleas or are convicted may lose their jobs or be unable to obtain jobs, especially in fields such as childcare and healthcare. Like other survivors, they will undoubtedly face challenges gaining or retaining custody of their children.[17] Unlike other survivors, they may also be subject to civil detention and removal.[18]

Convictions will also significantly complicate immigration status applications that survivors may have filed based on having been a victim of domestic violence, sexual assault or other crime.[19] If they already have such status, it may impede gaining lawful permanent residence or citizenship.[20]

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[14] *See* Deanna Kwong, ***Removing Barriers for Battered Immigrant Women: A Comparison of Immigrant Protections Under VAWA I & II***, 17 Berkeley Women's L.J. 137, 139-43 (2002).

[15] National Clearinghouse, *The Impact of Arrests and Convictions on Battered Women*, *supra* note 9 at 1-2.

[16] *Id.* at 2.

[17] *Id.* at 2-3.; *See also* Hirschel & Buzawa, *supra* note 9.

[18] *See, e.g.*, 8 U.S.C. §§ 1227(a)(2) (criminal deportation grounds), 1182(a)(2) (criminal inadmissibility grounds).

The availability of the U visa, a form of relief for immigrant survivors of domestic violence and other crimes, does not necessarily prevent removal. Congress created the U visa in 2000[21] to (1) strengthen the ability of law enforcement agencies to detect, investigate, and prosecute crimes against noncitizens, encouraging them to "better serve immigrant crime victims;" and (2) create a new nonimmigrant visa category that will facilitate crime reporting by those not in lawful immigration status, comporting with the "humanitarian interests of the United States."[22] To qualify, law enforcement must certify that an applicant has been or is being "helpful."[23]

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[19] *See, e.g.*, 8 U.S.C. § 1154(a)(1)(A)(iii)(II)(bb) (good moral character for VAWA self-petitioners); *see also* 8 U.S.C. § 1182(a)(2) (admissibility for the U visa). Although Congress created a waiver of the domestic violence ground of removal for those who are not the primary perpetrator, *see* 8 U.S.C. § 1227(a)(7), it is unwieldy and complicated. It only applies to non-citizens against whom adversarial immigration court removal proceedings have already been instituted. The waiver therefore does nothing to prevent a domestic violence victim from being detained and placed in removal proceedings. Moreover, once the noncitizen is placed in removal proceedings, this waiver has difficult evidentiary requirements, such as establishing who was the primary perpetrator of violence in a relationship and the connection between the crime and the non-citizen's having been battered or subjected to extreme cruelty. 8 U.S.C. §§ 1227(a)(7)(A), (A)(i)(III)(bb). Yet most immigrants go unrepresented in removal proceedings. American Bar Association Commission on Immigration, *Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases* 5-8 (2010). Finally, DHS need not rely primarily on this ground to remove those with convictions, including survivors with convictions. It may deport survivors simply because they are present without admission or parole, refusing to exercise discretion in their favor because of their convictions.

[20] 8 U.S.C. § 1182(a)(2) (admissibility for lawful permanent residence); 8 U.S.C. § 1427(a) (good moral character for naturalization).

[21] Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 1513(a)(2), 114 Stat. 1464, 1533-34 (creating 8 U.S.C. §§ 1101(a)(15)(U)(i)(III), 1184(p)(1), & 1255(m)).

Unfortunately, local law enforcement delays,[24] refusal to participate in the U visa program,[25] and inconsistent policies,[26] diminish the effectiveness of the U visa as a deterrent to removal.[27] Nine years after the creation of the U visa, a study sponsored by the University of Washington found that DHS and local law enforcement collaboration was undermining efforts to protect victims of domestic violence, creating "intense fear among victims."[28] Indeed, ICE continues routinely to lodge detainers against non-citizens in county jails who have no or minor criminal convictions.[29]

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[22] *Id.* at § 1513(a)(2).

[23] *See* 8 U.S.C. §§ 1101(a)(15)(U)(i)(III), 1184(p)(1); *see also* 8 C.F.R. § 214.14(c)(2)(i) (certification requirement).

[24] *See* Anna Gorman, *A Race Between Protection and Deportation*, L.A. TIMES, July 13, 2009, *available at* http://articles.latimes.com/2009/jul/13/local/me-u-visa13 ("Attorneys contacted by The Times cited other such crime victims with pending applications who were deported, including a Virginia woman sent back to Uruguay and a Denver man removed to Mexico.").

[25] *Immigrants in Arizona face resistance to getting visas after being victims of crimes*, Public Radio International (Oct. 27, 2012, 6:30 AM), http://pri.org/stories/2012-10-27/immigrants-arizona-face-resistance-getting-visas-after-being-victims-crimes ("'I don't want my office to be in a position to help someone gain legal status for the purpose of prosecuting a criminal case,'" [Maricopa County Attorney Bill] Montgomery explained in an interview.").

[26] Lindsey J. Gill, *Secure Communities: Burdening Local Law Enforcement and Undermining the U Visa*, 54 Wm. & Mary L. Rev. 2055, 2068-70 (2013).

[27] *See* Leslye E. Orloff et al., *Mandatory U-Visa Certification Unnecessarily Undermines the Purpose of the Violence Against Women Act's Immigration Protections and Its "Any Credible*

Despite these obstacles, the U visa program has proven its worth.[30] But the program is limited to 10,000 principal visas per year, which were used in the first two months of this fiscal year. *See* United States Citizenship and Immigration Services, *USCIS Approves 10,000 U Visas for 5th Straight Fiscal Year"*, Dec. 11, 2013, *available at* http://www.uscis.gov/news/alerts/uscis-approves-10000-u-visas-5th-straight-fiscal-year. Moreover,

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Evidence" Rules – A Call for Consistency, 11 Geo. J. Gender & L. 619, 637 (2010) (noting that many enforcement agencies and prosecutors' offices have failed to designate an official from the agency to sign U Visa certifications).

[28] Sarah Curry et al., *The Growing Human Rights Crisis Along Washington's Northern Border*, (Pramila Jayapal & Sarah Curry eds., 2009).

[29] Transactional Records Access Clearinghouse (TRAC), *New ICE Detainer Guidelines Have Little Impact* (Oct. 1, 2013), http://trac.syr.edu/immigration/reports/333/ ("[O]nly slightly more than a third (38 percent) of the individuals against whom detainers were issued had any record of a criminal conviction, including minor traffic violations. If traffic violations (including DWI) and marijuana possession violations are excluded, then only one-quarter (26 percent) of the individuals against whom detainers were issued had any conviction.").

[30] *See, e.g.*, Department of Homeland Security, *U Visa Law Enforcement Certification Resource Guide* (2011), *available at* http://www.dhs.gov/xlibrary/assets/dhs_u_visa_certification_guide.pdf.

victims who might qualify for a U visa if they help the criminal system "never will if they are too afraid to report crimes."[31]

C. Reporting of abuse would suffer if the Court defines "misdemeanor crime of domestic violence" overbroadly.

i. Although immigrant survivors seek relief from abuse, they may not view deporting the abuser as the best solution.

For some survivors, deporting the abuser may harm the survivor and her family.[32] For instance, family members of immigrants charged with domestic violence may nonetheless rely on that individual as the sole support for the family. Deporting the "breadwinner" may punish the survivor for reporting, subjecting her and her children (who are often U.S. citizens) to devastating loss of economic support.

To avoid this injustice, many domestic violence courts seek to provide victim-centered solutions. When this involves immigrant survivors and abusers, avoiding removal while holding the abuser accountable may be the court's primary goal. The New York State Judicial Committee on Women in the Courts advises that deportation of abusers

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[31] Gill, *supra* note 26, at 2085.

[32] "A victim's refusal to cooperate with prosecution and fear of what may happen if she cooperates may be justified . . . ." *See* Erin S. Gaddy, National Center for the Prosecution of Violence Against Women, *Why the Abused Should Not Become the Accused* (2006), *available at* http://www.ndaa.org/pdf/the_voice_vol_1_no_8_2006.pdf.

> is not necessarily a desirable outcome for abused immigrant women. If a victim depends on her abuser for support, the last thing she may want is to see him transported thousands of miles away, where he may be unable to earn a living and where support enforcement mechanisms may be meaningless.[33]

One way courts implement a victim-centered approach is to impose a penalty that does not necessarily subject those with criminal convictions to deportation, often by avoiding convictions that include the "crime of violence" elements. The Washington State Supreme Court stresses that fear of being removed after contacting police "is of particular concern in cases of domestic violence, when the victim wants to stop the abuse but does not want to lose a family member to ICE detention and/or possible deportation."[34] If there is no leeway for fashioning pleas that reflect the victims' wishes, immigrant victims are much less likely to access help. When victims of crimes fear reporting, they and their children are more isolated and their communities are less safe.

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[33] New York State Judicial Committee on Women in the Courts, *Immigration and Domestic Violence: A Short Guide for New York State Judges* 4 (2009), *available at* http://www.nycourts.gov/ip/womeninthecourts/ImmigrationandDomesticViolence.pdf.

[34] Washington State Supreme Court Gender and Justice Commission & Minority and Justice Commission, *Immigration Resource Guide for Judges* 3-5 (2013).

ii. A broad interpretation of what is meant by "misdemeanor crime of domestic violence" in this case, if applied in the immigration context, could discourage immigrant domestic violence survivors from contacting the police.

Enlarging the "misdemeanor crime of domestic violence" definition to encompass simple assault convictions that cover nonviolent conduct could transform them into deportable crimes and, in many cases into drastic, unwaivable "aggravated felony" offenses.[35] Aggravated felonies are among the most serious criminal convictions in immigration law.[36] This development would discourage immigrant communities, already fearful of the growing enmeshment of criminal and immigration law enforcement, from reporting domestic violence.

According to Eileen Hirst, chief of staff to former San Francisco Sheriff Michael Hennessey, "in a domestic violence case, it is not that unusual for police to arrive and arrest both parties and let the evidence get sorted out later" at the police station. Officers might fingerprint both parties to see whether they have criminal records. "By the time the details get sorted out, he or she can be on an ICE detainer and on the way to a detention facility. . . . This can make people reluctant to call police when they should."[37]

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[35] A misdemeanor simple assault with a suspended sentence of 365 days could become an aggravated felony if deemed to be a crime of violence under 18 U.S.C. § 16(a), *see, e.g.*, *United States v. Gonzalez–Tamariz*, 310 F.3d 1168, 1170-1171 (9th Cir. 2002) (misdemeanor can be "aggravated felony").

[36] Any non-permanent resident with such a conviction is subject to administrative removal without a hearing before an immigration judge, under 8 U.S.C. § 1228(b) (expedited removal of non-LPRs with aggravated felony convictions); *see also* Dan Kesselbrenner & Lory Rosenberg, *Immigration Law & Crimes* (2013-2 ed.), § 8:26.

A study conducted in late 2012 found that "the increased involvement of police in immigration enforcement has significantly heightened the fears many Latinos have of the police, contributing to their social isolation and exacerbating their mistrust of law enforcement authorities." 70% of undocumented immigrants surveyed reported they are less likely to contact law enforcement authorities if they were victims of a crime. 28 percent of U.S.-born Latinos said they are less likely to contact police officers if they have been the victim of a crime because they fear that police officers will use this interaction as an opportunity to inquire into their immigration status or that of people they know:[38]

> The large share of "mixed status" families that include undocumented immigrants, authorized immigrants, and U.S. citizens is likely a factor here as well; deportation policies frequently result in family separation, and many Latinos perceive police contact as placing themselves or their family members and friends at risk. As a

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[37] Shankar Vedantam, *No Opt-out for Immigration Enforcement*, WASH. POST, Oct. 1, 2010, *available at* http://goo.gl/dcdJFN.

[38] Nik Theodore, *Insecure Communities: Latino Perceptions of Police Involvement in Immigration Enforcement* i (May 2013), *available at* http://goo.gl/rXFqLO.

> result, they are less like to voluntarily contact police to report crimes.[39]

As Hubert Williams, then-President of the Police Foundation, and Newark, New Jersey Police Chief for eleven years, testified to the House Judiciary Committee in 2009:

> In communities where people fear the police, very little information is shared with officers, undermining the police capacity for crime control and quality services delivery. . . . As a police chief in one of our focus groups asked, 'How do you police a community that will not talk to you?'"[40]

For these reasons, *amici* respectfully request that this Court consider carefully the implications of *Castleman* for immigrant domestic violence victims and for fighting crime in immigrant communities.

CONCLUSION

Amici respectfully urge the Court to affirm the judgment of the Court of Appeals.

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[39] *Id.* at 16.

[40] *Hearing on Public Safety and Civil Rights Implications of State and Local Enforcement of Federal Immigration Laws*, 111th Cong. 111-19, 81-82 (Apr. 2, 2009 statement of Hubert Williams), *available at* http://judiciary.house.gov/hearings/hear_090402.html.

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DECEMBER 23, 2013

AMICUS
CURIAE
BRIEF

No. 12-1371

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

JAMES ALVIN CASTLEMAN,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF THE BRADY CENTER TO PREVENT GUN VIOLENCE, THE COALITION TO STOP GUN VIOLENCE, THE LAW CENTER TO PREVENT GUN VIOLENCE, MOMS DEMAND ACTION FOR GUN SENSE IN AMERICA, STATES UNITED TO PREVENT GUN VIOLENCE, AND THE VIOLENCE POLICY CENTER AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*[1]

The **Brady Center to Prevent Gun Violence** is a non-profit organization dedicated to reducing gun violence through education, research, and legal advocacy. The Brady Center has a substantial interest in ensuring that firearms are kept out of the hands of dangerous people who pose a significant risk of committing crimes, including an interest in ensuring that 18 U.S.C. § 922(g)(9) and other federal gun laws are properly applied to allow strong government action to prevent gun violence. This Court cited an *amicus* brief filed by the Brady Center in construing Section 922(g)(9) in *United States v. Hayes*, 555 U.S. 415, 427 (2009). Through its Legal Action Project, the Brady Center has also filed *amicus* briefs in numerous other cases involving the constitutionality and interpretation of firearms laws, including *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010); *District of Columbia v. Heller*, 554 U.S. 570 (2008); and *Woollard v. Gallagher*, 712 F.3d 865 (4th Cir. 2013), *cert. denied*, No. 13-42, 2013 WL 3479421 (U.S. Oct. 15, 2013).

The **Coalition to Stop Gun Violence** is a non-profit organization that seeks to secure freedom from gun violence through research, strategic engagement, and policy advocacy. The Coalition filed an *amicus* brief in *Printz v. United States*, 521

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[1] The parties have consented to the filing of this brief, and letters confirming such consent have been lodged with the Clerk. No counsel for a party authored this brief in whole or in part, and no person or entity other than the *amici curiae* or their counsel made a monetary contribution intended to fund the preparation of this brief.

U.S. 898 (1997), and its affiliated organization, the Educational Fund to Stop Gun Violence, has filed *amicus* briefs in numerous cases involving gun laws.

The **Law Center to Prevent Gun Violence**, formerly known as the Legal Community Against Violence, provides comprehensive legal expertise in support of gun violence prevention and the promotion of smart gun laws nationwide. The Law Center joined the Brady Center in filing an *amicus* brief in *United States v. Hayes*, 555 U.S. 415 (2009), and has filed numerous other *amicus* briefs in cases involving the constitutionality and interpretation of gun laws.

Moms Demand Action for Gun Sense in America is a non-partisan grassroots organization with more than 100,000 members and chapters in every state. A core purpose of Moms Demand Action is to advocate for common-sense federal and state gun laws in order to curtail the epidemic of gun violence in the United States.

States United to Prevent Gun Violence is a national non-profit organization that works to decrease gun death and injury by supporting existing state-based gun violence prevention organizations as well as building new organizations within the 50 states to prevent gun violence.

The **Violence Policy Center** is a non-profit organization that works to stop the broad-based public health crisis that is gun violence through research, advocacy, education, and collaboration. The Center regularly submits and joins *amicus* briefs in cases that involve gun laws.

SUMMARY OF ARGUMENT

18 U.S.C. § 922(g)(9) broadly prohibits any individual "who has been convicted in any court of a misdemeanor crime of domestic violence" from possessing firearms or ammunition. The breadth of this prohibition is no accident: After focusing on the relationship between domestic violence and firearm-related injuries and fatalities, Congress determined that all individuals convicted of domestic abuse offenses at the misdemeanor level should be prohibited from possessing firearms.

If the Court were to adopt the restrictive reading of Section 922(g)(9) endorsed by respondent and the Sixth Circuit, the end result would be to place deadly weapons in the hands of thousands of individuals who have a history of abusing their family members and domestic partners and who, when armed, pose a heightened risk to the members of their households and communities.

Numerous studies conducted both before and after Congress enacted Section 922(g)(9) support Congress's decision to include all domestic violence misdemeanors in the firearms ban. That social science learning demonstrates that individuals convicted of crimes involving domestic abuse are more likely to use a firearm to seriously injure or kill their intimate partners and family members in the future, as well as law enforcement and others who respond to domestic abuse situations. And laws that restrict domestic abusers' use of firearms have been associated with a significant reduction in domestic homicides.

The legislative history reveals that Congress enacted Section 922(g)(9) because its Members recognized that domestic abusers are likely to repeat their crimes, that the severity of these crimes typically escalates over time, and that the abuse is many times more likely to culminate in a death if the perpetrator has access to a firearm. As Senator Patty Murray, one of the bill's main proponents, aptly stated during debate on the legislation, "the gun is the key ingredient most likely to turn a domestic violence incident into a homicide." 142 Cong. Rec. 22,987 (1996) (statement of Sen. Murray).

The Sixth Circuit erred in interpreting Section 922(g)(9) to apply only to individuals convicted of offenses that have, as an element, the use or attempted use of "strong and violent physical force." Such a limitation has no basis in the plain language of Section 922(g)(9) or the definition of "misdemeanor crime of domestic violence" in 18 U.S.C. § 921(a)(33)(A), and would defeat the manifest purpose of the statute.

Our review of the legislative history did not reveal a single instance in which one of the bill's supporters (or even one of its few opponents) suggested that the prohibition should apply only to individuals who committed misdemeanors with "strong and violent physical force." This is unsurprising given Congress's understanding that misdemeanor crimes, more often than felony crimes, encompass conduct involving lower levels of physical force, and Congress's conclusion that all individuals convicted even of misdemeanors involving domestic abuse pose a serious threat of future harm.

ARGUMENT

I. Limiting Section 922(g)(9) To Those Convicted Of Offenses Requiring Proof Of "Strong And Violent Physical Force" Would Allow Many Domestic Abusers Ready Access To Firearms.

Any interpretation of 18 U.S.C. § 922(g)(9)[2] that limits its application to domestic abusers with convictions for offenses that have, as an element, the use or attempted use of "strong and violent physical force" would permit many individuals with a history of domestic violence to escape the statute's reach. The point is well illustrated by two cases in which lower courts addressed the question presented here: *United States v. Smith*, 171 F.3d 617 (8th Cir. 1999), and *United States v. Armstrong*, 706 F.3d 1 (1st Cir. 2013). In each case, the court of appeals affirmed the defendant's conviction for a violation of Section 922(g)(9) after adopting the Government's reading of the statute; in each case, the defendant could have gone free under a more restrictive reading of the statute. The stories underlying these cases reveal the types of continuing domestic abuse that Congress intended to fall within the reach of Section 922(g)(9) so as to prevent future firearm-related violence.

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[2] Section 922(g) reads in relevant part:

> It shall be unlawful for any person—
>
> ...
>
> (9) who has been convicted in any court of a misdemeanor crime of domestic violence, to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. § 922(g).

> [T]he term "misdemeanor crime of domestic violence" means an offense that—
>
> (i) is a misdemeanor under Federal, State, or Tribal law; and
>
> (ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.

Id. § 921(a)(33)(A).

William Maurice Smith and Lauralee Lorenson began living together in Iowa in 1993, shortly before Lauralee gave birth to their son. *See* Memorandum in Support of United States' Resistance to Defendant's Motion to Dismiss at 6, *United States v. Smith*, 964 F. Supp. 286 (N.D. Iowa 1997) (No. CR 96-2140), ECF No. 35 ("*Smith* Mem.").[3] According to the Government's submission, Smith abused Lauralee from the start. *Id.* He would lose his temper when Lauralee spoke to other men, when she did not wash the dishes, or when she did not clean their house. *See id.* On one occasion, Smith pointed a gun at Lauralee's head. *Id.* at 7. Another time, he fired a 9mm revolver in her general direction to scare her. *See id.* at 6-7. When Lauralee threatened to leave Smith or to call the police, Smith responded with more physical threats. *See id.* at 7.

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[3] These facts about the Smith case are drawn from a brief filed by the United States in connection with Smith's prosecution under Section 922(g)(9). Smith appears to have disputed some of the Government's account. *See Smith* Mem. at 6 n.1.

In September 1994, Lauralee finally talked to the police. A week later, Smith appeared at the nursing home where Lauralee worked and chased her into the building. After Smith cornered Lauralee in an elevator, he grabbed her by the throat and pushed her to the floor. *See id.* at 7-9. Lauralee pressed charges. Smith pleaded guilty to violating Iowa's simple misdemeanor assault statute and paid a small fine. *Id.* at 8-10.[4]

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[4] At the time, Iowa Code § 708.1 provided:

> A person commits an assault when, without justification, the person does any of the following:
>
> 1. Any act which is intended to cause pain or injury to, or which is intended to result in physical contact which will be insulting or offensive to another, coupled with the apparent ability to execute the act.
>
> 2. Any act which is intended to place another in fear of immediate physical contact which will be painful, injurious, insulting, or offensive, coupled with the apparent ability to execute the act.
>
> 3. Intentionally points any firearm toward another, or displays in a threatening manner any dangerous weapon toward another.

Iowa Code § 708.1 (1994). Smith was charged under paragraph (1). *Smith*, 171 F.3d at 619.

The couple reconciled and married in 1995, but the abuse continued. *Smith* Mem. at 10-11. In October 1996, Lauralee's coworkers noticed conspicuous marks on her neck. *Id.* at 11. Smith had grabbed her by the neck and choked her. *Id.*

Smith was facing charges stemming from this incident on November 15, 1996, when he purchased a Grendel .380 pistol from a local pawn shop. *Id.* at 12. Around midnight the night after Smith bought the pistol, the couple fought. *Id.* at 13. At some point, Smith used his new gun to shoot Lauralee from behind. The bullet broke a rib and punctured her lung before exiting near her shoulder. *Id.* It came within inches of her heart, but Lauralee survived. *Id.* at 13-14.

After first telling police that her husband was not the shooter, Lauralee conceded that Smith had shot her but maintained that he had done so by accident. *Id.* Lauralee's unwillingness to cooperate with local prosecutors meant "there was little possibility that a prosecution under Iowa law would result in any significant sentence. It appeared that Smith, like so many other batterers, would escape with impunity." Tom Lininger, *A Better Way to Disarm Batterers*, 54 Hastings L.J. 525, 527 (2003) [hereinafter Lininger].

But the newly enacted Section 922(g)(9) permitted federal prosecutors to charge Smith with a violation of federal law based on his 1994 conviction. Smith conditionally pleaded guilty, and the Eighth Circuit affirmed his conviction even though the Iowa assault statute under which he had been convicted contained, as an element, "physical contact" that is merely "insulting or offensive"—*not* "strong and violent." *Smith*, 171 F.3d at 619-21 & n.2. Under an unduly narrow interpretation of Section 922(g)(9), Smith's conviction would not have been a qualifying predicate offense, and he would likely have escaped federal prosecution.

Like Smith, William Armstrong III had a history of domestic violence. Also like Smith, Armstrong had prior convictions for misdemeanor assault, but none under a statute that requires the use of "strong and violent physical force." He too would retain ready access to firearms under a narrow reading of Section 922(g)(9).

In the early 1990s, Armstrong was convicted of assaulting a girlfriend. *See* Transcript of Sentencing Proceedings at 6-7, *United States v. Armstrong*, 1:11-cr-00050-JAW (D. Me. Feb. 14, 2012), ECF 60 ("*Armstrong* Tr."). His subsequent marriage was marked by "tension" and "problems ... in his relationships with his wife and children." Defendant's Memorandum Regarding Sentencing at 1, *United States v. Armstrong*, 1:11-cr-00050-JAW (D. Me. Feb. 10, 2012), ECF 52 ("*Armstrong* Mem."). In 2002, Armstrong was convicted of simple assault against his wife, Rosanna, after pushing her and grabbing her in a manner that left marks on her body. *Id.* In 2008, an argument between Armstrong and Rosanna escalated until Armstrong "hit[] her hard" and then "lock[ed] her outside," in the middle of the Maine winter, with "only ... her slippers on." *Armstrong* Tr. at 18.

The 2008 incident resulted in Armstrong's conviction for violating Maine's domestic violence assault statute. *See* Transcript of Plea & Sentencing Hearing, *Maine v. Armstrong*, No. FARSC-CR-2008-

00432 (Me. Super. Ct. Dec. 30, 2008). The allegations in the criminal complaint against Armstrong tracked the elements of Maine's domestic violence assault statute, which do not include the use of strong and violent physical force. *See* Complaint, *Maine v. Armstrong*, No. FARSC-CR-2008-00432 (Me. Super. Ct. Dec. 30, 2008).[5] The state trial judge nevertheless informed Armstrong that, as a result of his conviction, federal law would prohibit his possession of a firearm or ammunition. *See id.* at 3, 6-7. Armstrong, however, was later discovered to be in possession of three rifles, three shotguns, a revolver, and more than 1000 rounds of ammunition. *See* Indictment at 1-2, *United States v. Armstrong*, 1:11-cr-00050-JAW (D. Me. Feb. 13, 2011), ECF 2; Transcript of Conditional Guilty Plea at 14-16, *United States v. Armstrong*, 1:11-cr-00050-JAW (D. Me. Sept. 26, 2011), ECF 59. After his federal arrest, Armstrong was charged with yet another domestic violence assault against Rosanna. *See Armstrong* Mem. at 3; *Armstrong* Tr. at 9.

Armstrong pleaded guilty to violating Section 922(g)(9). The First Circuit adopted the Government's reading of the statute and affirmed Armstrong's conviction on that basis. *See Armstrong*, 706 F.3d at 1.

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[5] Under Maine law, "[a] person is guilty of assault if … [t]he person intentionally, knowingly or recklessly causes bodily injury or offensive physical contact to another person," Me. Rev. Stat. Ann. tit. 17-A, § 207(1), and "is guilty of domestic violence assault if … the victim is a family or household member," *id.* § 207-A(1).

Are William Maurice Smith and William Armstrong III individuals who Congress intended to shield from the reach of Section 922(g)(9) and thus to have ready access to guns? No. The manifest purpose of Section 922(g)(9) is to prohibit those with a history of domestic violence like Smith's or Armstrong's—including those convicted of simple misdemeanor assaults in domestic situations—from possessing firearms. Yet under a narrow reading of Section 922(g)(9) like the Sixth Circuit's, neither Smith nor Armstrong acted in violation of the statute. *Cf.* Pet. Br. 37-39 & n.18 (identifying Iowa and Maine's assault statutes as not giving rise to a qualifying conviction under the decisions below).

While these dangerous domestic abusers were originally able to obtain firearms due to other weaknesses in America's firearms laws, the fact remains that a properly construed Section 922(g)(9) makes such possession and violence less likely by punishing—and thus deterring—such dangerous conduct.

II. Social Science Studies Support Laws Prohibiting Domestic Abusers' Possession Of Firearms.

Tragedies like those in the *Smith* and *Armstrong* cases occur by the thousands in America when domestic abusers have access to firearms. Social science research confirms Congress's conclusion that *all* individuals who are convicted of domestic assault misdemeanors should be prohibited from owning firearms. A conviction for a domestic violence crime is highly correlated with the commission of future crimes against spouses and intimate partners, regardless of whether the initial crime involved strong and violent physical force.

Domestic violence plagues hundreds of thousands of American households each year. The Justice Department reports that approximately 907,000 incidents of intimate partner violence occurred in 2010. Shannon Catalano, BUREAU OF JUSTICE STATISTICS, *Intimate Partner Violence, 1993–2010* 1 (2012). Women are at a significantly greater risk than men of being severely injured or murdered in a domestic dispute. Approximately one-third of female homicide victims were murdered by their intimate partners, compared with approximately four percent of male homicide victims. *See* April M. Zeoli & Daniel W. Webster, *Effects of Domestic Violence Policies, Alcohol Taxes and Police Staffing Levels on Intimate Partner Homicide in Large U.S. Cities*, 16 INJURY PREVENTION 90 (2010) [hereinafter Zeoli & Webster]. Women are four times as likely to be shot by a boyfriend or husband than by a stranger. *See* M. Miller et al., *State-Level Homicide Victimization Rates in the U.S. in Relation to Survey Measures of Household Firearm Ownership, 2001-2003*, 64 SOCIAL SCIENCE & MEDICINE 656 (2007). Of 1,601 homicides of women in the United States in 2011, 1,509, or 94 percent, were committed by men who knew the victims. *See* VIOLENCE POLICY CENTER, *When Men Murder Women: An Analysis of 2011 Homicide Data* (2013), *available at* http://www.vpc.org/studies/wmmw2013.pdf.

Contrary to respondent's view,[6] "minor" domestic violence convictions often lead to more serious crimes, including homicide. Domestic abusers demonstrate a "pattern of coercive control in a partner relationship, punctuated by one or more acts of intimidating physical violence, sexual assault, or credible threat of physical violence." R. Lundy Bancroft et al., THE BATTERER AS PARENT: ADDRESSING THE IMPACT OF DOMESTIC VIOLENCE ON FAMILY DYNAMICS 3 (2002). For that reason, minor domestic violence incidents often lead to more serious crimes. *See* Alex R. Piquero et al., *Assessing the Offending Activity of Criminal Domestic Violence Suspects: Offense Specialization, Escalation, and De-Escalation Evidence from the Spouse Assault Replication Program* (2005), *available at* https://www.ncjrs.gov/pdffiles1/nij/grants/212298.pdf. More than 65 percent of women who are murdered by their intimate partners had previously been victims of domestic abuse. *See* Lawrence A. Greenfield et al., *Violence by Intimates: Analysis of Data on Crimes by Current or Former Spouses, Boyfriends, and Girlfriends*, U.S. Department of Justice Report No.: NCJ-167237 (1998).

Individuals who have committed a previous domestic assault pose a particularly high risk of using firearms to harm others. Access to firearms by domestic abusers is strongly correlated with intimate partner female homicide. *See* Jacquelyn C. Campbell et al., *Risk Factors for Femicide in Abusive Relationships: Results from a Multisite Case Control*

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[6] *See* Resp. Brief in Opp. to Cert. at 13.

Study, 93 AM. J. OF PUB. HEALTH 1089, 1090 (2003). Similarly, the presence of a gun in a violent home increases the risk that domestic violence will lead to a fatality. A woman's risk of being a domestic homicide victim is said to increase seven fold if she lives in a house with at least one firearm. James E. Bailey et al., *Risk Factors for Violent Death of Women in the Home*, 157 ARCHIVES OF INTERNAL MEDICINE 777, 777-78 (1997); *see also* Shannon Frattaroli & Jon S. Vernick, *Separating Batterers and Guns: A Review and Analysis of Gun Removal Laws in 50 States*, 30 EVALUATION REV. 296, 299-312 (June 2006) (recommending that states develop procedures for police to confiscate firearms from domestic abusers); Emily F. Rothman et al., *Gun Possession Among Massachusetts Batterer Intervention Program Enrollees*, 30 EVALUATION REV. 283, 291-92 (2006) (concluding that convicted domestic batterers with access to firearms pose lethal threat to their partners); Linda E. Saltzman et al., *Weapon Involvement and Injury Outcomes in Family and Intimate Assaults*, 267 J. AM. MED. ASS'N 3043, 3046 (1992) (firearms-related family and intimate assaults are three times as likely to be fatal than assaults involving knives). From 1980 to 2000, 60 percent to 70 percent of domestic abusers who killed their female intimate partners used firearms to do so. Emily F. Rothman et al., *Batterers' Use of Guns to Threaten Intimate Partners*, 60 J. AM. MED. WOMEN'S ASS'N 62, 62 (2005).

Accordingly, state laws that restrict access to firearms by individuals subject to a domestic violence restraining order see a 19 percent reduction in intimate partner homicide. Zeoli & Webster, *supra*, at 90-95. Similarly, prohibiting violent misdemeanants from possessing firearms has been associated with a decrease in the risk of arrest for new firearm crimes and violent crimes. *See* Garen J. Wintemute, et al., *Effectiveness of Denial of Handgun Purchase by Violent Misdemeanants* 2 (2002), *available at* https://www.ncjrs.gov/pdffiles1/nij/grants/197063.pdf.

In addition to putting household members at greater risk, respondent's interpretation of Section 922(g) would endanger the lives of law enforcement officers who respond to domestic violence calls. Between 1996 and 2005, approximately 14 percent of all law enforcement fatalities occurred during responses to domestic violence reports. *See* National Law Enforcement Officers Memorial Fund, *Domestic Violence Takes a Heavy Toll on the Nation's Law Enforcement Community* (2007).

In short, domestic abuse is strongly correlated with future violent domestic crimes, including homicides. A narrow reading of § 922(g)(9) would put firearms in the hands of people who pose a serious risk to their spouses or partners, law enforcement officers, and others.

III. The Text And Legislative History Of Section 922(g)(9) Demonstrate That Congress Intended To Prevent Convicted Domestic Abuse Misdemeanants From Possessing Firearms.

Congress enacted Section 922(g)(9) to effectuate a policy of "zero tolerance" because there is "no margin of error when it comes to domestic abuse and guns." 142 Cong. Rec. at 19,415, 22,986 (statements of Sen. Lautenberg). Accordingly, Section 922(g)(9) broadly prohibits "any person" convicted of a "misdemeanor crime of domestic violence" from possessing a firearm. 18 U.S.C. § 922(g)(9). In turn, "misdemeanor crime of domestic violence" is defined to encompass any "misdemeanor" that has as an element "the use or attempted use of physical force, or the threatened use of a deadly weapon" in a domestic setting. *Id.* § 921(a)(33)(A). Conspicuously absent from the statute is any language that limits its scope to persons convicted under statutes requiring "strong and violent physical force."

Until the mid-1990s, the Gun Control Act prohibited convicted felons, but not misdemeanants, from possessing firearms. *See Hayes*, 555 U.S. at 418. Concerned that this ban was ineffective in keeping guns away from domestic abusers, Congress expanded the categories of persons subject to the firearm prohibition to reduce the risk posed by armed domestic abusers. In 1994, it extended the ban to individuals subject to domestic restraining orders. 18 U.S.C. § 922(g)(8). Then, in 1996 with Section 922(g)(9), Congress further extended the existing firearm prohibition to those with a conviction of even a "*misdemeanor* crime of domestic violence." 18 U.S.C. § 922(g)(9) (emphasis added). Congress did so based on its understanding that domestic violence tends to escalate over time, but that domestic abusers are often initially convicted of a misdemeanor "under a generic use-of-force statute," rather than of a felony. *Hayes*, 555 U.S. at 426. Since Congress recognized that such a history of abuse is more likely to culminate in homicide or other serious bodily injury if the misdemeanant has access to a firearm, Congress adopted a broad ban that encompasses all domestic abuse convictions, including those under generic misdemeanor assault and battery statutes not requiring the use of "strong and violent" physical force.

Interpreting Section 922(g)(9) to apply only to individuals convicted of a misdemeanor offense that has, as an element, the use or attempted use of "strong and violent physical force" would undermine the policy underlying the statute. Instead, as it did in *United States v. Hayes*, 555 U.S. 415 (2009), the Court should apply Section 922(g)(9) in accord with its text and in a manner that furthers "Congress' aim in extending the gun possession ban." *Id.* at 422 n.5; *see also id.* at 426-27 (declining to adopt a reading of § 922(g)(9) that "would frustrate Congress' manifest purpose" in enacting the statute).

A. Congress Broadly Targeted The Problem Of Domestic Abuse And Guns.

Congress's enactment of Section 922(g)(9) was not its first action to combat the dangers of domestic violence and guns. Rather, it was a second major step in a series of reforms intended to protect victims of domestic abuse from firearm-related violence. The federal Gun Control Act of 1968 prohibited felons and other categories of potentially dangerous persons from possessing firearms. *See* 18 U.S.C. § 922(g)(1)-(7). In the 1990s, however, Congress became concerned that perpetrators of domestic violence were able to access guns despite the prohibitions of the Gun Control Act. To combat this problem, Congress prohibited two new categories of persons from possessing firearms: those subject to domestic restraining orders and those convicted of misdemeanors involving domestic abuse. These new prohibitions show a sustained Congressional intent to go beyond the felony gun bar and single out an array of domestic abuse situations for intervention.

First, in 1994, Congress expanded the list of firearms disabilities by adding a prohibition against the possession of a firearm by any person "who is subject to a court order that ... restrains such person from harassing, stalking, or threatening an intimate partner ... or child." 18 U.S.C. § 922(g)(8). This reform stemmed from several competing bills offered in 1993 as amendments to an Omnibus Crime Bill. Senator Paul Wellstone and Representative Robert Torricelli proposed bills seeking to prohibit gun possession by anyone subject to a restraining order as well as by any person convicted of a misdemeanor crime of domestic violence. *See* S. 1570, 103d Cong. (1993) (Sen. Wellstone's bill); H.R. 3301, 103d Cong. (1993) (Rep. Torricelli's bill). Senator John Chafee proposed a version of the bill prohibiting gun possession only for those subject to a restraining order. *See* 139 Cong. Rec. 28,509 (1993) (language of amendment 1169 to S. 1607, the crime bill).

The sponsors of these bills emphasized the need to expand the law because of the dangers inherent in the possession of firearms by domestic abusers, and because differences in charging practices were otherwise resulting in ineffective protections for battered women and children under current law. *See, e.g.*, 139 Cong. Rec. at 30,578-79 (statement of Sen. Chafee) ("There have been far, far too many dreadful cases in which innocent people ... have been wounded or killed by a former boyfriend or girlfriend, partner, or other intimate using a gun—despite the fact that the attacker was subject to a restraining order."); *id.* at 28,360 (statement of Sen. Wellstone) (explaining that the bill says, "if you are not responsible enough to keep from doing harm to your spouse or your children, then society does not deem you responsible enough to have a gun"); 140 Cong. Rec. 14,998 (1994) (statement of Sen. Wellstone) (explaining how batterers can often escape the felony gun ban because they are not charged with felonies); *see also* H.R. Rep. No. 103-711, at 391 (1994) (Conf. Rep.) ("Congress finds ... that domestic violence is the leading cause of injury to women in the United States between the ages of 15 and 44; firearms are used by the abuser in 7[%] of domestic violence incidents ... ; and individuals with a history of domestic abuse should not have easy access to firearms."). In the end, the narrower bill prohibiting only those subject to restraining orders from gun possession became the law. *See* Lininger, *supra*, at 536-43.

By 1996, Congress determined that a further expansion of the firearms prohibition to domestic violence misdemeanants was necessary. Congress had recognized that domestic abuse tends to escalate over time, and saw that this escalation coupled with the presence of a gun was likely to result in a shooting death or injury but that"[e]xisting felon-in-possession laws ... were not keeping firearms out of the hands of domestic abusers." *See Hayes*, 555 U.S. at 426. Senator Frank Lautenberg's bill proposing a misdemeanant possession ban was introduced to "close this dangerous loophole." 142 Cong. Rec. at 22,986 (statement of Sen. Lautenberg).[7] Senator Lautenberg's bill passed nearly unanimously in the Senate on two occasions, *see id.* at 22,985 (explaining bill's earlier unanimous Senate passage as amendment to anti-stalking bill); *id.* at 22,988 (passing bill 97-2 as amendment to Treasury and Postal Service Appropriations Act), and Congress eventually enacted Section 922(g)(9) as part of an omnibus appropriations bill. *See* Pub. L. No. 104-208, § 658, 110 Stat. 3009, 3009-371 to -372 (Sept. 30, 1996).

Congress viewed Section 922(g)(9) as necessary in light of two related problems: First, unlike other crimes, domestic violence is historically underprosecuted and undercharged, meaning that many violent abusers end up with only misdemeanor rather than felony convictions, and specifically with convictions under statutes that do not require an element of strong and violent force. Second, and again unlike other crimes, domestic violence tends to escalate, and thus is particularly dangerous even as to those who have been prosecuted at the misdemeanor level. To ensure that both problems were addressed, Congress enacted Section 922(g)(9) as a broad, "zero tolerance," "no margin of error" ban on the possession of firearms by those with any conviction of a misdemeanor involving domestic abuse. 142 Cong. Rec. at 19,415, 22,986 (statements of Sen. Lautenberg).

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[7] This Court has treated the floor statements of Senator Lautenberg, Section 922(g)(9)'s sponsor, as instructive albeit "not controlling." *Hayes*, 555 U.S. at 439.

1. Congress Understood That Domestic Abuse Crimes Were Not Routinely Charged Under Statutes Requiring Strong And Violent Physical Force.

As this Court has previously recognized, Congress intended Section 922(g)(9) to address the fact that domestic abusers were (and are) frequently convicted of misdemeanors under generic assault or battery statutes, rather than of more serious offenses. *See Hayes*, 555 U.S. at 427 (explaining that "domestic abusers were ... routinely prosecuted under generally applicable assault or battery laws").

The Senate debate is replete with references to the need broadly to target those convicted of misdemeanors, recognizing that such crimes may in fact have been more serious than suggested by the statute under which conviction was secured. Senator Lautenberg referred to "convictions" for "assault" without any suggestion that only assaults accompanied by strong and violent physical force would qualify. 142 Cong. Rec. at 26,675 (statement of Sen. Lautenberg) ("[C]onvictions for domestic violence-related crimes often are for crimes, such as assault ... .").

Members of Congress found that "[o]utdated or ineffective laws often treat[ed] domestic violence as a lesser offense." *Id.* at 22,988 (statement of Sen. Feinstein); *see also id.* at 19,415 (statement of Sen. Lautenberg) ("[O]ne-third of the cases that would be considered felonies if committed by strangers are, instead, filed as misdemeanors."); *id.* at 22,986 (statement of Sen. Wellstone) ("In all too many cases, unfortunately, if you beat up or batter your neighbor's wife, it is a felony. If you beat up or batter, brutalize your own wife or your own child, it is a misdemeanor."). A leading proponent of Section 922(g)(9) also observed that "plea bargains often result in misdemeanor convictions for what are really felony crimes." *Id.* at 22,988 (statement of Sen. Feinstein). Failing to treat domestic violence as "a serious crime" was seen as a problem "enormous" in scope. *Id.* at 22,986 (statement of Sen. Lautenberg).

To ensure that state charging practices and variations in state misdemeanor definitions did not impede its goal of disarming domestic abusers nationwide, Congress did not limit the new firearm prohibition's application to statutes requiring any particular degree of force. Senator Lautenberg accordingly described the bill's aim in sweeping and unqualified terms. *E.g.*, *id.* (statement of Sen. Lautenberg) ("no margin of error when it comes to domestic abuse and guns"); *id.* at 19,415 (statement of Sen. Lautenberg) ("zero tolerance when it comes to guns and domestic violence").

2. Congress Understood That Domestic Abuse Tends To Escalate.

In applying Section 922(g)(9), it bears emphasis that the provision was crafted in accord with a well-documented intent to meet the unique dangers inherent in situations of domestic abuse. As respondent correctly observes, *see* Resp. Brief in Opp. to Cert. at 11-12, Congress was concerned about violent physical conduct. *See, e.g.*, 142 Cong. Rec. at 22,987 (statement of Sen. Lautenberg) (describing "the fellow who first treated [his wife] to a fist in the face"). But its concerns did not stop there: Congress felt that domestic abuse, unlike other types of violence, poses a unique risk even at the misdemeanor level because of its tendency to escalate.

Senator Lautenberg explained that, "[b]y their nature, acts of domestic violence are especially dangerous and require special attention." *Id.* at 22,986 (statement of Sen. Lautenberg). It was Congress' view that all domestic abusers are dangerous, not only those who have already committed offenses that would come close to meeting the definition of a felony. *Cf. id.* at 22,985 (explaining that the amendment, to use the "simplest words," says that "a spouse abuser, wife beater, or child abuser should not have a gun").

Congress was particularly concerned because of evidence that domestic violence tends to escalate, both over time and within the context of a single incident. Within a single incident, the presence of a gun can turn a domestic confrontation deadly in an instant. *See, e.g., id.* at 22,987 (statement of Sen. Murray) ("[T]he gun is the key ingredient most likely to turn a domestic violence incident into a homicide."). Similarly, a spouse who starts with a "minor" beating and resulting misdemeanor conviction might inflict more serious harm the next time around, including potentially fatal harm if a gun is present.

> These crimes involve people who have a history together and perhaps share a home or

> a child. These are not violent acts between strangers, and they don't arise from a chance meeting. Even after a separation, the individuals involved, often by necessity, have a continuing relationship of some sort, either custody of children or common property ownership.

Id. at 19,415 (statement of Sen. Lautenberg). Congress recognized that the ongoing nature of most relationships involving domestic violence made it likely that abuse would continue to occur again and again, and get worse and worse over time.

Congress therefore saw a need to protect past and future victims, often women and children, by taking away the gun that might turn the next incident deadly. The new law, in Senator Lautenberg's view, would "save the life" of the "ordinary American woman" caught in an escalating cycle of domestic abuse. This woman's "generally . . . decent, law-abiding" husband occasionally "loses his temper" when "the stresses of life build," sometimes even "los[ing] control" and lashing out at his family. *Id.* at 26,674 (statement of Sen. Lautenberg). The hypothetical abuser that Senator Lautenberg envisioned had once before beaten his wife and pleaded to a misdemeanor. In the future, Senator Lautenberg foresaw, this husband would "lose his cool at work, or with the boys," "get into another argument with his wife." *Id.* Next, things will "escalate" and "get out of control":

> As their children huddle in fear, the anger will get physical, and almost without knowing what he is doing, with one hand he will strike his wife and with the other hand he will reach

> for the gun he keeps in his drawer. In an instant their world will change. And this woman, this loving mother, this ordinary American, will die or be severely wounded.

Id. Removing the gun from this situation would not prevent the argument or even perhaps the violence, Senator Lautenberg explained, but it would "save [this woman's] life." *Id.*

As this Court recognized in describing legislative intent in *Hayes*, "[f]irearms and domestic strife are a potentially deadly combination nationwide." 555 U.S. at 427. "Domestic violence, *no matter how it is labeled*, leads to more domestic violence, and guns in the hands of convicted wife beaters lead[] to death." 142 Cong. Rec. at 22,986 (statement of Sen. Lautenberg) (emphasis added). Aware of the reality that the likelihood of escalation makes *any* level of domestic violence misdemeanant especially dangerous, Congress did not limit its firearms ban only to those offenders who have already escalated to using "strong and violent physical force." For some victims, waiting that long might be too late. *See id.* (statement of Sen. Lautenberg) ("It may sound like a tough policy, but when it comes to domestic violence it is time to get tough. There is no margin of error when it comes to domestic abuse and guns. A firearm in the hands of an abuser all too often means death.").

B. The Statutory Text And Legislative History Confirm That Section 922(g)(9) Is Not Limited To Persons Convicted Of A Misdemeanor Offense That Has, As

An Element, The Use Of "Strong And Violent Physical Force."

The statutory text and legislative history of Section 922(g)(9) demonstrate that the Sixth Circuit erred in interpreting the provision to apply only to individuals convicted under statutes which proscribe the use of "strong and violent physical force" yet "which happen[] to be ... misdemeanor[s]." Pet. App. 12a.

The Sixth Circuit rested its decision on the statutory phrase "has, as an element, the use or attempted use of physical force." *Id.* at 7a (internal quotation marks omitted). This phrase, which was added to the bill as an "apparently last-minute insertion," *Hayes*, 555 U.S. at 428, does not by its terms require "strong and violent physical force," and the legislative history does not support grafting such a requirement onto the statutory language.

First, Members of Congress recognized that offenses that have, as an element, the use or threatened use of strong and violent physical force are likely to be felonies, not misdemeanors. *See, e.g.*, 142 Cong. Rec. at 22,986-87 (statement of Sen. Wellstone) ("For example, in my State of Minnesota, an act of domestic violence is not characterized as a felony unless there is permanent physical impairment, the use of a weapon, or broken bones."). The central purpose of Section 922(g)(9), however, is to prohibit the possession of a firearm by individuals who have *not* been convicted of a felony. The Sixth Circuit's reading of the statute would thus undermine Section 922(g)(9)'s purpose and diminish its practical effect.

Second, when Congress enacted Section 922(g)(9), "domestic abusers were ... routinely prosecuted under generally applicable assault or battery laws," *Hayes*, 555 U.S. at 427, which typically do not require proof of strong and violent physical force. *See* Pet. Br. 37-39; *cf.* 142 Cong. Rec. at 26,675 (statement of Sen. Lautenberg) ("[C]onvictions for domestic violence-related crimes often are for crimes, such as assault ... ."). Even if there were misdemeanor laws targeting only "strong and violent physical force," it is highly unlikely that Congress intended Section 922(g)(9) to cover only such a limited category of offenses. *Cf. Hayes*, 555 U.S. at 427 ("[W]e find it highly improbable that Congress meant to extend 922(g)(9)'s firearm possession ban only to the relatively few domestic abusers prosecuted under laws rendering a domestic relationship an element of the offense.").

Nor is there any indication in the legislative record that Congress believed that the states would need to enact new assault-and-battery laws redefining those generic misdemeanors if they wished to trigger Section 922(g)(9). Congress saw convicted domestic abusers' uninhibited access to firearms as a pervasive problem, *supra* Part III.A, and meant for Section 922(g)(9) to address that problem from the day the statute took effect. *Cf. Hayes*, 555 U.S. at 427 ("Given the paucity of state and federal statutes targeting *domestic* violence, we find it highly improbable that Congress meant to extend § 922(g)(9)'s firearms possession ban only to the relatively few domestic abusers prosecuted under laws rendering a domestic relationship an element of the offense.").

Third, neither the word "violence" in the term "misdemeanor crime of domestic violence" nor the phrase "physical force" in the accompanying definition should be understood to limit the statute's reach to offenses involving strong and violent physical force. "Domestic violence" is both a defined term and a term of art, and considered in either light does not require a showing of strong violence. By statute, the "use or attempted use" of mere "physical force" is sufficient.

Moreover, the term "domestic violence" is one that is used to describe the pervasive problem and special dangers of abuse in the home and to describe a range of types and degrees of abuse. Rather than emphasizing the word "violence" or asserting that it connotes extreme force, Members of Congress used the phrase "domestic violence" interchangeably with "domestic abuse" during legislative discussions. *See, e.g.*, 142 Cong. Rec. at 21,438; *id.* at 22,986; *id.* at 25,001-02.

Finally, respondent is incorrect that the statute's "use or attempted use of physical force" language "reflect[s] Congress's desire to focus specifically on the use of actual violence against a family member, rather than acts that are violent in some more abstract sense." Resp. Brief in Opp. to Cert. at 12 n.3. This language was added to exclude property crimes from the definition of "misdemeanor crime of domestic violence," not to differentiate between classes of crimes against the person. *See* 142 Cong. Rec. at 26,675 (statement of Sen. Lautenberg) (explaining that this language prevents Section 922(g)(9) from applying to someone convicted of "cutting up a credit card with a pair of scissors");

cf. 18 U.S.C. § 16(a) (defining "crime of violence" as "an offense that has as an element the use, attempted use, or threatened use of physical force against the person *or property* of another" (emphasis added)).

CONCLUSION

For the foregoing reasons, the judgment of the Sixth Circuit should be reversed.

Respectfully submitted,

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AMICUS
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BRIEF

No. 12-1371

IN THE
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UNITED STATES OF AMERICA,

Petitioner,

v.

JAMES ALVIN CASTLEMAN,

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On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR THE CHILDREN'S DEFENSE FUND AND THE AMERICAN ACADEMY OF PEDIATRICS AS *AMICI CURIAE* SUPPORTING PETITIONER

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BRIEF FOR THE CHILDREN'S DEFENSE FUND AND THE AMERICAN ACADEMY OF PEDIATRICS AS *AMICI CURIAE* SUPPORTING PETITIONER

STATEMENTS OF INTEREST[1]

The Children's Defense Fund and the American Academy of Pediatrics respectfully submit this brief as *amici curiae*.

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[1] No party or counsel for a party authored this brief in whole or in part. No party, counsel for a party, or person other than *amici curiae*, its members, or counsel made any monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief in letters lodged with the Clerk.

Children's Defense Fund

The Children's Defense Fund (CDF) is a non-profit organization that for four decades has pursued a healthy start, a head start, a fair start, and a safe start for every child. In its work to keep children safe, it advocates for an end to both family violence and gun violence and their impact on children.

For more than 20 years, CDF has published an annual report, *Protect Children Not Guns*. It highlights recent reliable national and state data on gun violence in America to educate the public and policymakers about steps they can take to protect children from violence.

CDF has previously filed briefs amicus curiae in cases involving the interpretation of federal laws that have a direct impact on the lives of children, including *Florida* v. *United States Dep't of Health and Human Servs.*, 132 S. Ct. 2566 (2012); *District of Columbia* v. *Heller*, 554 U.S. 570 (2008); and *Washington State Dep't of Social and Health Servs.* v. *Guardianship Estate of Danny Keffeler*, 537 U.S. 371 (2003).

American Academy of Pediatrics

Founded in 1930, the American Academy of Pediatrics (AAP) is a national, non-profit organization dedicated to furthering the interests of children's health. Since AAP's inception, its membership has grown from 60 pediatricians to over 60,000 primary care pediatricians, pediatric medical subspecialists, and pediatric surgical specialists. Over the past 80 years, AAP has become a powerful voice for children's health through education, research, advocacy, and the provision of expert professional advice. AAP works with federal, state and local governments, health care providers, and parents on behalf of America's children. The Academy has issued policy statements regarding keeping children safe from gun violence and the effects of intimate partner violence on children.

SUMMARY OF ARGUMENT

Domestic violence is a pervasive national problem, with hundreds of thousands of incidents of abuse reported annually. Tennessee, the Respondent's home state, has one of the highest rates of domestic violence in the country, reporting 82,000 incidents of domestic violence in 2012 alone. Children are far too often the silent victims of these crimes, experiencing not only physical harm, but psychological harm as well.

The effects of domestic violence are exacerbated, often fatally, when a gun is added to the fray. A gun increases the likelihood of domestic homicide. It also contributes to nonfatal domestic abuse: access to a firearm magnifies abusers' abilities to control others in the household and enhances the physical and psychological effects experienced by victims, namely intimate partners and children.

Congress enacted the Lautenberg Amendment, codified at 18 U.S.C. § 922(g)(9), to counteract this violence by preventing the perpetrators of these crimes, often habitual offenders, from possessing firearms. The Sixth Circuit's decision in the case below undermines the Amendment's disarmament goal. The court's ruling, if upheld, could result in the re-arming of thousands of domestic violence abusers, placing children and other family members directly in harm's way.

The appellate court's interpretation of Supreme Court precedent and Congressional intent is deeply flawed. By reading into the definition of "misdemeanor crime of domestic violence" a requirement of "violent force," the Sixth Circuit misapplied this Court's holding in ***Johnson*** v. ***United States***, 559 U.S. 133 (2010), a case concerning the definition of a more severe category of crimes—specifically "violent felon[ies]." The Sixth Circuit's decision also renders the Lautenberg Amendment a dead letter in approximately half of the states in the nation, where the underlying state criminal statutes do not specify the degree of force required to be convicted of a crime of domestic violence. And the Sixth Circuit's holding undercuts the clear purpose of the Amendment: to disarm those convicted of domestic violence crimes.

The Sixth Circuit's decision should be reversed.

ARGUMENT

I. DOMESTIC VIOLENCE IS EXACERBATED WHEN ABUSERS HAVE ACCESS TO FIREARMS.

The federal Gun Control Act of 1968 prohibits convicted felons from possessing firearms. *See United States* v. *Hayes*, 555 U.S. 415, 418 (2009). The 1996 Lautenberg Amendment expanded the 1968 Act's prohibition to individuals "convicted in any court of a misdemeanor crime of domestic violence." 18 U.S.C. § 922(g)(9). The statute defines a "misdemeanor crime of domestic violence" as an offense that:

> (i) is a misdemeanor under Federal, State, or Tribal law; and (ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim. [18 U.S.C. § 921(a)(33)(A).]

By removing guns from the hands of domestic violence perpetrators, the Lautenberg Amendment sought to address and remedy a pervasive national problem: the use of guns in domestic violence.

Each year in the United States, approximately 1.3 million women and 835,000 men are physically assaulted by an intimate partner.[2] In Tennessee alone—the state where this case arose—there were over 82,000 victims of domestic violence just last year.[3]

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[2] Patricia Tjaden & Nancy Thoennes, U.S. Dep't of Justice, Nat'l Inst. of Justice & Ctrs. for Disease Control & Prevention, *Full Report of the Prevalence, Incidence, and Consequences of Intimate Partner Violence Against Women: Findings from the National Violence Against Women Survey*, at iv (2000), *available at* http://www.ojp.usdoj.gov/nij/pubs-sum/183781.htm.

[3] Tenn. Bureau of Investigations, *Crime in Tennessee 2012*, at 50 (2012), *available at* http://www.tbi.tn.gov/tn_crime_stats/publications/2012%20Crime%20in%20Tennessee%20Final.pdf.

Children are the silent, common victims of domestic violence: one national survey found that nearly twenty percent of children in the United States are exposed to physical violence between parents during their lifetime.[4] To begin with, unmarried women with children suffer abuse at the hands of their intimate partners at a rate more than six times higher than unmarried women with no children, and more than *ten* times higher than married women with children.[5] An estimated 15.5 million children living in married or cohabitating households are exposed to domestic violence each year in the United States, and about seven million of them live in homes where the domestic violence is severe.[6]

Violence between domestic partners also significantly increases the risk that a child will be subjected to abuse or neglect as well.[7] The co-occurrence of child abuse and intimate partner violence is well documented; studies have shown that in "30% to 60% of families in which either child maltreatment or [intimate partner violence] is occurring, the other form of violence also is being perpetrated."[8] Even when children are not physically harmed by domestic abuse, they risk having lasting psychological harm from their exposure to unsafe family situations.[9] Indeed, children *indirectly* exposed to domestic violence face some of the same behavioral and emotional problems as children who themselves are physically abused.[10] Both groups may suffer from lasting behavioral and physical health complications, including anxiety, depression,

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[4] Sherry Hamby *et al.*, U.S. Dep't of Justice, Office of Justice Programs, *Children's Exposure to Intimate Partner Violence and Other Family Violence*, at 6 (2011), *available at* https://www.ncjrs.gov/pdffiles1/ojjdp/232272.pdf.

[5] Shannon Catalano, U.S. Dep't of Justice, Office of Justice Programs, *Intimate Partner Violence, 1993-2010*, at 7 (2012), *available at* http://www.bjs.gov/content/pub/pdf/ipv9310.pdf.

[6] Renee McDonald *et al.*, *Estimating the Number of American Children Living in Partner-Violent Families*, 20 J. of Family Psychology 137, 139 (2006), *available at* http://smu.edu/experts/study-documents/family-violence-study-may2006.pdf.

[7] Children's Defense Fund Ohio, *Children Who Witness Domestic Violence*, at 2 (Oct. 2009), *available at*

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https://www.childrensdefense.org/ohio (children in households where domestic violence occurs are 1500% more likely to experience abuse or neglect than the national average).

[8] Jonathan D. Thackeray *et al.*, *Intimate Partner Violence: The Role of the Pediatrician*, 125 Pediatrics 1094, 1095 (2010), *available at* http://pediatrics.aappublications.org/content/125/5/1094.full.html [hereinafter "*Role of the Pediatrician*"].

[9] *See id.* ("Children of abused caregivers demonstrate significantly more internalizing behaviors, including anxiety, depression, withdrawal, and somatic complaints, as well as externalizing behaviors, including attention problems, aggressive behavior, and rule-breaking actions, than do children of nonabused caregivers. * * * Stress and anxiety can persist long after the trauma of [intimate partner violence] exposure.")

[10] Unicef, *Behind Closed Doors: The Impact of Domestic Violence on Children*, at 3 (2006), *available at* http://www.unicef.org/protection/files/BehindClosedDoors.pdf [hereinafter "*Behind Closed Doors*"].

violence against peers, and learning disabilities.[11] And the effects of violence in the home are felt right away: even infants and small children exposed to such violence may suffer so much emotional distress that it can harm brain development and impair cognitive and sensory growth.[12] "Abuse during pregnancy has been associated with several poor health outcomes for [infants], including preterm labor, low birth weight, intracranial injury, and neonatal death."[13]

Violence between domestic partners, or against the children in those homes, too often escalates to the worst outcome imaginable. Between 1980 and 2008, 28.7% of homicide victims were killed by a spouse, an intimate partner, or another family member.[14]

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[11] David Finkelhor *et al.*, U.S. Dep't of Justice, Office of Justice Programs, *Children's Exposure to Violence: A Comprehensive National Survey*, at 2 (2009), *available at* https://www.ncjrs.gov/pdffiles1/ojjdp/227744.pdf; R. Lundy Bancroft, *et al.*, The Batterer as Parent: Addressing the Impact of Domestic Violence on Family Dynamics 38-39 (Claire M. Renzetti & Jeffrey L. Edleson eds., 2d ed. 2002).

[12] *Behind Closed Doors*, *supra* n.10, at 7 (behavior problems among infants as a result of exposure to domestic violence can include "excessive irritability, sleep problems, emotional distress, fear of being alone, immature behavior, and problems with toilet training and language development").

[13] *Role of the Pediatrician*, *supra* n.8, at 1095.

[14] Alexia Cooper & Erica L. Smith, U.S. Dep't of Justice, Office of Justice Programs, *Homicide Trends in the United States, 1980-2008, Annual Rates for 2009 and 2010*, at 16–17 (2011), *available at* http://www.bjs.gov/

During that same period, 49.4% of homicide victims were killed by other acquaintances.[15] Pregnant and recently pregnant women are more likely to be victims of homicide than to die of any other cause.[16] And an estimated 750 children were killed by domestic abusers in 2011.[17] Ninety percent of children killed during a domestic dispute are under the age of ten; fifty-six percent are less than two years old.[18]

The weapon of choice for domestic abusers? Often, a gun. In homes where domestic violence already exists, the presence of a gun magnifies the risk of homicide six-fold.[19] "[W]omen who were threatened

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content/pub/pdf/htus8008.pdf [hereinafter "*Homicide Trends*"].

[15] *Id.*

[16] Isabelle L. Horon & Diana Cheng, *Enhanced Surveillance for Pregnancy-Associated Mortality - Maryland, 1993–1998*, 11 JAMA 1455, 1457 (2011).

[17] Child Welfare Information Gateway, *Child Abuse and Neglect Fatalities 2011: Statistics and Interventions*, at 2, 5 (2013), *available at* https://www.childwelfare.gov/pubs/factsheets/fatality.pdf. Parents were responsible for 78.3% of child abuse or neglect fatalities. *Id.* at 5.

[18] Sibnath Deb, Children in Agony: A Source Book 7 (Sibnath Deb ed. 2006) (citing Fla. Governor's Task Force on Domestic & Sexual Violence, *Florida Mortality Review Project*, at 51, tbl. 28 (1997)).

[19] Jacquelyn C. Campbell *et al.*, *Assessing Risk Factors for Intimate Partner Homicide*, at 16 *in* U.S. Dep't of Justice, Nat'l Institute of Justice, *Intimate Partner Homicide* (2003), *available at* https://www.ncjrs.gov/pdffiles1/jr000250.pdf.

or assaulted with a gun or other weapon were 20 times more likely than other women to be murdered. Women whose partners threatened them with murder were 15 times more likely than other women to be killed."[20] Guns are used more than any other weapon when women are killed by their intimate partners.[21] Between 1980 and 2000, sixty to seventy percent of the incidents of domestic abuse that resulted in the death of an intimate partner involved a firearm.[22] And even when it is not used to kill, a gun wielded by a domestic abuser increases the frequency of ongoing, nonfatal domestic abuse by increasing the abuser's ability to control a victim; the ever-present threat of gun violence makes it more difficult for victims to leave their abusers.[23]

Gun violence in the home has lasting detrimental effects on children, placing their mental and physical welfare at risk. As one report chillingly put it:

> Visions of children attempting to intervene to protect their mother from a perpetrator's assault and in doing so being struck themselves, crawling along the floor with the

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[20] *Id.*

[21] Susan B. Sorenson, *Firearm Use in Intimate Partner Violence: A Brief Overview*, 30 *Evaluation Review* 229, 232-33 (2006) ("Women are more than twice as likely to be shot by their male intimate as they are to be shot, stabbed, strangled, bludgeoned, or killed in any other way by a stranger.").

[22] Emily F. Rothman *et al.*, *Batterers' Use of Guns to Threaten Intimate Partners*, 60 J. Am. Med. Women's Ass'n 62, 62 (2005).

[23] Sorenson, *supra* n.21, at 235.

> lights out for fear of being seen through a window by a mother's ex-boyfriend, leaving bicycles "just so" in front of an entry door in order to detect whether the perpetrator had entered the home while they were gone, all painted an extraordinarily troubling picture of the terror that permeates every aspect of these young lives.[24]

Children exposed, even indirectly, to gun violence may experience both long- and short-term psychological trauma, which in turn is linked to, among other things, withdrawal from society, sleep disruption, trouble concentrating in the classroom, high levels of anger, and juvenile delinquency.[25] Children who witness domestic disputes involving a weapon that result in injuries are even more likely to experience post-traumatic stress disorder symptoms.[26] One study, for example, found significantly higher risks of behavior problems among children whose parents use—or threaten to use—guns or knives during a marital dispute, when compared to children who witness domestic violence not involving weapons.[27] Children exposed to domestic violence involving weapons also have an increased risk of committing violent offenses themselves.[28] And children who lose a parent to domestic homicide often may be placed in foster homes or left to be raised by older siblings, receiving little if any counseling or support.[29]

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[24] Hennepin Cnty. Domestic Fatality Review Pilot Project, *2002 Annual Report*, at 24 (2002), *available at* http://www.amatteroflifeanddeath.org/wp-content/uploads/2011/04/112799246Domestic_Fatality_Review_Pilot_Project_Report.pdf [hereinafter "*Fatality Review Project*"].

[25] *Role of the Pediatrician*, *supra* n.8, at 1095; James Garbarino *et al.*, *Mitigating the Effects of Gun Violence on Children and Youth*, *in* 12 *The Future of Children: Children, Youth and Gun Violence* 73, 74 (2002); Karen Slovak & Mark Singer, *Gun Violence Exposure and Trauma Among Rural Youth*, 16 Violence and Victims 389, 394-97 (2001).

[26] John Fantuzzo & Rachel Fusco, *Children's Direct Sensory Exposure to Substantiated Domestic Violence Crimes*, 22 Violence & Victims 158, 167 (2007); Garbarino, *supra* n.25, at 75-76.

The anecdotes are regular and relentless:

On September 19 of this year, in the small town of Santa Fe, Tennessee, a man shot and killed his wife before turning the gun on himself. The couple's three children were at home. Before the murder-suicide, police "had been called to the [home] multiple times for domestic situations."[30]

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[27] Ernest N. Jouriles *et al.*, *Knives, Guns, and Interparent Violence: Relations with Child Behavior Problems*, 12 J. of Family Psychology 178, 190-192 (1998).

[28] *Id.* at 180; *see* Steve Spaccarelli *et al.*, *Exposure to Serious Family Violence Among Incarcerated Boys: Its Association With Violent Offending and Potential Mediating Variables*, 10 Violence and Victims 163, 174 (1995).

[29] *See, e.g.*, *Fatality Review Project*, *supra* n.24, at 24.

[30] Josh DeVine, *Maury County couple dead in apparent murder-suicide*, WSMV.com (Oct. 4, 2013, 9:27 AM), http://www.wsmv.com/story/23483959/police-man-shoots-wife-in-apparent-murder-suicide.

On September 4 of this year, a Nashville, Tennessee, man shot his estranged ex-girlfriend (and the mother of his child) at her workplace before killing himself. The victim had previously gotten an order of protection against the shooter.[31]

On May 11 of this year, a man shot and killed a woman, severely injured his girlfriend, and then killed himself in a domestic dispute in a home in Huntsville, Alabama. Two children, a toddler and a preschooler, were present in the home during the ordeal. When interviewed, a neighbor reported that police "were called repeatedly over the past year or two to settle domestic disturbances involving the [shooter]."[32]

In January of this year, a Kalamazoo, Michigan, man shot and injured his girlfriend after striking her with his gun. It was his second domestic violence offense.[33]

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[31] Julia Bruck, *Tennessee ranks among worst states for domestic violence*, WSMV.com (Sept. 20, 2013, 10:53 PM), http://www.wsmv.com/story/23365563/tennessee-ranks-among-worst-states-for-domestic-violence.

[32] Paul Huggins, *Third Huntsville shooting victim clinging to life; neighbors say couple had pattern of domestic violence*, Blog.al.com (May 12, 2013, 6:14 PM), http://blog.al.com/breaking/2013/05/third_huntsville_shooting_vict.html.

[33] Rosemary Parker, *Kalamazoo man charged with domestic violence following girlfriend's shooting*, MLive.com (Jan. 7, 2013, 4:36 PM), http://www.mlive.com/news/kalamazoo/index.ssf/2013/01/kalamazoo_man_charged_with_dom.html.

In December 2012, a man shot and killed his girlfriend as she boarded a bus in Washington, D.C with the couple's one-year-old daughter in her arms. The child was injured, but survived.[34]

In November 2012, a man in Smyrna, Tennessee, shot and killed his ex-girlfriend and then turned the gun on her mother, critically injuring her in the process. Prior to the shooting, the slain victim filed an assault report with Smyrna Police and obtained an order of protection against the shooter. The couple had a young child together.[35]

In February 2011, a man in Mobile, Alabama, shot his seventeen-year-old son during an argument at their home. The shooter had an extensive criminal history, including an arrest for attempted murder.[36]

In August 2011, a man shot and killed his girlfriend before taking his own life outside of Oswego, Illinois. Three children were present in the home during the ordeal. The couple had a well-documented history of domestic violence. Months before the fatal shooting, the assailant was arrested for allegedly hitting the victim in the face, "grabbing her by the hair, and slamming her head to the ground."[37]

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[34] Pamela Brown & Jennifer Donelan, *Selina Brown killed, child shot on Metrobus in SE*, WJLA.com (Dec. 9, 2012, 8:45 PM), http://www.wjla.com/articles/2012/12/woman-child-shot-on-se-metrobus-woman-dies-82910.html.

[35] *Man Pleads Guilty to Killing Ex-Girlfriend, Injuring Her Mother*, Newchannel5.com (Nov. 13, 2012, 3:05 PM), http://www.newschannel5.com/story/20086231/man-pleads-guilty-to-killing-ex-girfriend-injuring-her-mother.

[36] Derica Williams, *Father has history of domestic violence*, Fox10tv.com (Feb. 4, 2011, 4:05 PM), http://www.fox10tv.com/news/father-has-history-of-domestic-violence.

In July 2010, a man in Gaston County, North Carolina, shot his pregnant girlfriend and their three children before turning the gun on himself. Only the couple's seven-year-old daughter survived. Prior to the incident, the shooter's girlfriend had sought, and been awarded, an order of protection. In her application, she wrote that the shooter had "threatened to kill [her] many times * * *, and that [h]e stomped [her] to the ground * * * hitting and kicking [her]."[38] Two of the couple's children witnessed those incidents. Their mother's application for protection reported: "My 3 and 4-year-old children were screaming 'Stop Daddy, don't hurt mommy.' "[39]

In May 2010, a man shot and killed his two sons, ages four and seven, near Athens, Georgia. Prior to the shooting, the abuser repeatedly threatened the boys' mother—who had filed several domestic-violence complaints against him—and had previously been arrested for aggravated stalking for contacting the mother in violation of a court protective order.[40]

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[37] Erin Sauder, *Court Records Detail Domestic Violence Leading Up to Murder-Suicide*, Oswego.patch.com (Aug. 17, 2011, 8:45 PM), http://oswego.patch.com/groups/police-and-fire/p/two-dead-in-oswego-in-apparent-murder-suicide.

[38] Heath Hannon, *et al.*, *Father in murder-suicide had a second family, police say*, WBTV.com (Aug. 13, 2010, 10:52 PM), http://www.wbtv.com/story/12783855/father-in-murder-suicide-had-a-second-family-police-say (internal quotations omitted).

[39] *Id.*

In April 2009, a man shot and killed his five children in a mobile home park in Pierce County, Washington. The children ranged in age from seven through sixteen. Following the shooting, neighbors reported that they often heard "family arguments," and the father "screaming and yelling at the children."[41]

This sad recitation could go on for volumes. The Lautenberg Amendment was designed to contribute to a solution to this persistent problem. Prohibiting someone convicted of a misdemeanor domestic-violence charge from owning a gun reduces the chances for fatal and non-fatal injuries during domestic disputes. It eliminates the abuser's ability to use a firearm to control or terrorize his family.[42] The

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[40] Merritt Melancon, *Experts: No way to know why father snapped, killed kids Domestic violence questions*, Online Athens (May 10, 2010), http://onlineathens.com/stories/051010/new_636981968.shtml.

[41] Seattle Times Staff, *Five children slain in Graham-area home*, The Seattle Times (Apr. 5, 2009, 1:11 PM), http://seattletimes.com/html/localnews/2008986370_websixdead04m.html.

[42] *See* Fed. Bureau of Investigation, *Federal Denials, Reasons Why the NICS Section Denies, Nov. 30, 1998 – Oct. 31, 2013*, http://www.fbi.gov/about-us/cjis/nics/reports/denials_110813.pdf (last visited Nov. 21, 2013) (stating that from November 1998 – October 2013, 105,755 firearm sales have been denied because the purchaser had been convicted of a misdemeanor crime of domestic violence) [hereinafter "*Federal Denials*"].

Lautenberg Amendment also has been linked to a reduced risk of gun-related crimes and violent crimes.[43] Laws prohibiting abusers subject to restraining orders from purchasing firearms result in a statistically significant reduction in rates of homicide of women by their intimate partners.[44] More specifically, cities in states with such restrictions had *nineteen percent* fewer intimate partner homicides and *twenty-five percent* fewer intimate partner homicides with guns.[45] And individuals who attempted, but were denied, purchase of a firearm were much less likely than those who purchased a firearm to be arrested for a new crime involving guns or violence.[46]

Denying past abusers the ability to purchase guns also is common sense, given the high risk of recidivism among abusers. Most female victims of domestic violence have previously been assaulted by the same abuser.[47] One study found that forty-one percent of domestic violence victims reported re-assault within a thirty-month period.[48] And abuse tends to become more violent and frequent over time.[49]

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[43] Garen J. Wintemute *et al.*, Violent Prevention Research Program, *Effectiveness of Denial of Handgun Purchase by Violence Misdemeanants*, at 41-42 (2002), *available at* https://www.ncjrs.gov/pdffiles1/nij/grants/197063.pdf.

[44] Ctr. for Gun Policy & Research, John Hopkins Bloomberg School of Public Health, *Intimate Partner Violence and Firearms* (2012), *available at* http://www.jhsph.edu/research/centers-and-institutes/johns-hopkins-center-for-gun-policy-and-research/publications/IPV_Guns.pdf.

[45] Ctr. for Gun Policy & Research, John Hopkins Bloomberg School of Public Health, *Reducing Gun Violence in America Informing Policy with Evidence and Analysis*, at 57 (2013), *available at http://jhupress.files.wordpress.com/2013/01/1421411113_updf.pdf.*

[46] Wintemute, *supra* n.43, at 43-44;

By preventing individuals with a history of domestic violence from owning a gun, the Lautenberg Amendment reduces the likelihood that pervasive domestic violence will escalate to murder. The Sixth Circuit's ruling, however, permits thousands of convicted abusers to arm themselves[50], placing their partners and children at greater risk of personal or emotional injury, or worse.

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[47] Catalano, *supra* n.5, at 4; *see Role of the Pediatrician*, *supra* n. 8, at 1095 ("Many [victims of domestic violence] are victimized more than once, which raises estimates of event incidence to approximately 4.8 million women and 2.9 million men assaulted annually in the United States.").

[48] Edward Gondolf, *A 30-Month Follow-Up of Court-Referred Batterers in Four Cities*, 44 Int'l J. of Offender Therapy and Comparative Criminology 111 (2000).

[49] Nat'l Crim. Justice Reference Serv., U.S. Dep't of Justice, *Family Violence*, https://www.ncjrs.gov/spotlight/family_violence/summary.html (last visited Nov. 11, 2013).

[50] *See Federal Denials*, *supra* n. 42.

II. THE SIXTH CIRCUIT'S DECISION DISREGARDS THE STATUTE'S TEXT AND PURPOSE.

The Sixth Circuit held that the "use or attempted use of physical force" element in the Lautenberg Amendment's definition of "misdemeanor crime of domestic violence" requires "*violent* force." Pet. App. at 6a-10a. That holding disregards both the text and purpose of the governing statute.

A. Section 921(a)(33)(A)(ii) Does Not Require "Violent" Force.

To reach its conclusion that the Lautenberg Amendment required a showing of "violent force" before a domestic abuser was subject to the statute's gun prohibition, the Sixth Circuit compared the statutory definition of "misdemeanor crime of domestic violence" found in the Lautenberg Amendment with statutory definitions in two other provisions: "crime of violence" in 18 U.S.C. § 16(a), and "violent felony" in 18 U.S.C. § 924(e)(2)(B)(i). Pet. App. 6a-7a. Finding the language of the three provisions "nearly identical," the court concluded that Congress intended the three different provisions to "capture offenses criminalizing identical degrees of force." *Id.*

The court's analysis focused primarily on this Court's decision in *Johnson* v. *United States*. Interpreting 18 U.S.C. § 924(e)(2)(B)(i)'s definition of "violent felony," the Court held that the phrase "physical force" in the definition constituted "violent force"—that is, "force capable of causing physical pain or injury to another person." 559 U.S. at 140. From this starting point, the Sixth Circuit below concluded that the "physical force" language used in

Section 921(a)'s definition of "misdemeanor crime of domestic violence" similarly required force that rose to the level of "violent force * * * capable of causing physical pain or injury to another person." Pet. App. 6a-10a (quoting *Johnson*, 559 U.S. at 140).

But the whole reason the *Johnson* Court focused on "violent force" in the first place is that the question presented there concerned the definition of "*violent felony*." *Johnson*, 559 U.S. at 140. The *Johnson* Court thus concluded that the statute required it to look further beyond the common-law interpretation of "force,"—an element the Court explained was "satisfied by even the slightest offensive touching," *id.* at 139—and instead examine the heightened concept of "violent force." *Id.* at 140. This Court was persuaded that Congress' selection of the phrase "violent felony" itself had a "connotation of strong physical force" above the common-law definition, *id.* at 140-141, and rejected the notion that "Congress would select as a term of art defining 'violent felony' a phrase that the common law gave peculiar meaning only in its definition of a misdemeanor." *Id.* at 141. This Court noted that the "attachment" of "violent" and "felony" creates a particular and unique phrase, warranting a higher force definition. *Id.* at 140.

The *Johnson* Court thus made clear throughout that it was examining "the statutory category of 'violent felonies,' " not misdemeanors for which the common-law concept of force traditionally was applied and intended. *Id.* at 140. And to bring the point home, the *Johnson* Court expressly *declined to extend its holding to misdemeanor domestic-violence crimes*. As it explained, "[w]e have interpreted the phrase 'physical force' only in the context of a statutory definition of 'violent felony.' We do not decide that the phrase has the same meaning in the context of defining a misdemeanor crime of domestic violence." *Johnson*, 559 U.S. at 143-144; *see also United States* v. *Booker*, 644 F.3d 12, 18 (1st Cir. 2011) (noting that the *Johnson* "Court expressly rejected the suggestion that its analysis * * * would have any effect on interpretation of [18 U.S.C.] § 922(g)(9)").

Johnson thus provides an easy roadmap for reversal here. For unlike the statutory scenario presented in *Johnson*, the term "misdemeanor crime of domestic violence" warrants application of the common-law concept of "force"—not the heightened definition found in the "violent felony" statute. The statutory definition of "misdemeanor crime of domestic violence" tracks the common law definition of battery, defined as the "intentional application of unlawful force against the person of another." *Johnson*, 559 U.S. at 139. And "force," as used there and as noted above, encompassed "even the slightest offensive touching." *Id.* Departures from common-law definitions are appropriate only where "that meaning does not fit" and "produce[s] nonsense." *Id.* at 139-140 (quoting *Gonzales* v. *Oregon*, 547 U.S. 243, 282 (2006) (Scalia, J., dissenting)). No such "nonsense" exists here; the common-law definition plainly slots right in. *Id.*

It also makes plain sense. The perpetrators to which the language of § 922(g)(9) is directed are "routinely prosecuted under generally applicable assault or battery laws," *Hayes*, 555 U.S. at 427, crimes that generally embody the level of force contemplated under common law and are generally categorized as misdemeanors. *See Johnson*, 559 U.S. at 141. Therefore, the "significant" reason for breaking from the common-law definition in *Johnson*—that the common-law definition was not designed for violent felonies—simply does not exist here. *Id.*; *see also* Pet. App. at 24a (McKeague, J., dissenting) (making the same point); *United States* v. *Nason*, 269 F.3d 10, 16 (1st Cir. 2001) ("we must read the unqualified use of the term 'physical force' in section 922(g)(9) as a clear signal of Congress's intent that section 922(g)(9) encompass misdemeanor crimes involving all types of physical force").

Concluding, as the Sixth Circuit did, that the phrase "use of physical force" in § 921(a)(33)(A)(ii) means "violent force," because the phrasing of the statute is similar to the language used in 18 U.S.C. § 924(e)(2)(B)(i), ignores another important difference between the two statutes: they aim to address different wrongs. As the First Circuit explained,

> There are sound reasons to decline to interpret the two statutes in tandem. To be sure, [§ 924(e)(2)(B)(i)] and § 922(g)(9) are both animated by a protective rationale * * * . However, the statutes address significantly different threats. Whereas [§ 924(e)(2)(B)(i)] seeks to protect society at large from a diffuse risk of injury or fatality at the hands of armed, recidivist felons, § 922(g)(9) addresses an acute risk to an identifiable class of victims—those in a relationship with a perpetrator of domestic violence. [*Booker*, 644 F.3d at 20-21.]

The Court should decline to read into § 922(g)(9) language that does not appear in the statute and that would significantly undermine the statute's purpose.

B. The Sixth Circuit Failed To Consider The Practical Effect Of Its Ruling When Construing The Statute.

The practical impacts of the Sixth Circuit's decision are grave—which should have further informed its statutory analysis.

Simply put, the Sixth Circuit's interpretation of "use of physical force," if adopted nationwide, leaves thousands upon thousands of individuals convicted of domestic assault in legal possession of firearms. *See Johnson*, 559 U.S. at 153 (Alito, J., dissenting) (observing that "if the Court's interpretation of the term 'physical force' in [§ 924(e)(2)(B)(i)] is applied to § 922(g)(9), a great many persons convicted for serious spousal or child abuse will be allowed to possess firearms"). The domestic violence laws of nearly ***half*** the states do not specify degrees of force. *See id.*; *see also United States* v. *White*, 606 F.3d 144, 146 (4th Cir. 2010) (noting that defendant "contended that as Virginia uses the common law definition of battery, the elements of that crime could not meet the statutory definition of 'misdemeanor crime of domestic violence' "). Many abusers thus would not be subject to § 922(g)(9)'s gun prohibition simply because the statute under which they were convicted did not happen to label or categorize the force they used against their victims.

Take, for example, *United States* v. *Griffith*, 455 F.3d 1339 (11th Cir. 2006). Griffith was convicted under a Georgia battery statute of making "contact of an insulting and provoking nature to Delores Griffith, his wife, by hitting her * * *" and making "contact of an insulting and provoking nature to Delores Griffith, his wife, by dragging her across the floor." *Id.* at 1340. Griffith argued that he was not subject to Section 922(g)(9)'s prohibition because the Georgia battery statute required only " 'physical *contact* of an insulting or provoking nature,' " not "physical *force*." *Id.* at 1341 (quoting Ga. Code Ann. § 16-5-23(a)(1)) (emphasis added). The Eleventh Circuit rejected Griffith's argument. As the court of appeals explained, adopting it would lead to an "absurd" result, having "little or no basis in the real world," and one "at war with common sense." *Griffith*, 445 F.3d at 1345. That absurd and nonsensical result is the one the Sixth Circuit reached, and the one on review now.

Take, for another analogous example, the case of *Flores* v. *Ashcroft*, 350 F.3d 666 (7th Cir. 2003). There, the majority held that a statute requiring removal for any immigrant convicted of a "crime of domestic violence," 8 U.S.C. § 1227(a)(2)(E), did not apply to the defendant, because his domestic violence conviction was under an Indiana battery statute that covered "any touching." 350 F.3d at 669-670. Concurring, Judge Evans observed that the panel's conclusion, although legally accurate, was "divorced from common sense. * * * Flores actually beat his wife—after violating a restraining order based on at least one prior beating—and got a one-year prison sentence for doing so." *Id.* at 672 (Evans, J., concurring).

Courts routinely decline to interpret statutes in ways that would severely cripple their practical effect. *United States* v. *Hayes* itself is instructive. The *Hayes* Court considered whether § 922(g)(9) required the predicate misdemeanor to identify a domestic relationship as an element of the crime. 555 U.S. at 418. This Court rejected that contention. As it explained, "[p]ractical considerations strongly support" the reading the Court adopted, because "[c]onstruing § 922(g)(9) to exclude the domestic abuser convicted under a generic use-of-force statute * * * would frustrate Congress' manifest purpose," and would lead to the section being " 'a dead letter' in some two-thirds of the States from the very moment of its enactment." *Id.* at 426-427. *See also Nason*, 269 F.3d at 16 ("[F]rom a policy perspective, proscribing gun possession by individuals convicted of misdemeanor crimes characterized by the application of physical force advances Congress's evident purpose—curbing the escalating societal problems associated with domestic violence.")

And in *Dickerson* v. *New Banner Institute, Inc.*, a case involving a prior iteration of the Gun Control Act of 1968, the Court explained that " '[in] the absence of a plain indication to the contrary, * * * it is to be assumed when Congress enacts a statute that it does not intend to make its application dependent on state law,' " since federal statutes of national application would be impaired if state law controlled jurisdiction by jurisdiction. 460 U.S. 103, 119-120 (1983) (quoting *NLRB* v. *Natural Gas Util. Dist.*, 402 U.S. 600, 603 (1971)), *superseded by statute on other grounds*, Firearms Owners' Protection Act, Pub. L. No. 99-308, § 101, 100 Stat. 449, 449-451 (1986).

The Sixth Circuit's statutory interpretation runs up against both of these strong cautions. If the Sixth Circuit's decision is affirmed, the practical effect this Court cautioned against in *Hayes* will come to roost with full force. And the statute will inexorably be dependent on state law—and thus all but a dead letter in nearly half the states. *See* Pet. App. at 31a-32a (McKeague, J., dissenting). Children and their caregivers in, among other states, Tennessee, Georgia[51], California[52], Maine[53], Indiana[54], and Florida,[55] will remain largely unprotected even from abusers *already convicted* of domestic violence, all because of the vagaries of the state statutes under which those individuals were convicted.

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[51] Ga. Code Ann. § 16-5-23(a) (2011) ("A person commits the offense of simple battery when he or she either: (1) Intentionally makes physical contact of an insulting or provoking nature with the person of another; or (2) Intentionally causes physical harm to another").

[52] Cal. Penal Code § 242 (West 1872) ("A battery is any willful and unlawful use of force or violence upon the person of another.")

[53] Me. Rev. Stat. Ann. tit. 17-A, § 207(1)(a) (2005) ("A person is guilty of assault if: A. The person intentionally, knowingly or recklessly causes bodily injury or offensive physical contact to another person.").

[54] Ind. Code. Ann. § 35-42-2-1(1)(a) (West 2007) ("A person who knowingly or intentionally touches another person in a rude, insolent, or angry manner commits battery, a Class B misdemeanor.").

[55] Fla. Stat. Ann. § 784.03(1)(a) (West 2001) ("The offense of battery occurs when a person: 1. Actually and intentionally touches or strikes another person against the will of the other; or 2. Intentionally causes bodily harm to another person.").

A federal statute's ability to protect children and their caregivers from domestic abuse involving firearms should not turn on those happenstances. The established common-law construction of the statutory language, bolstered by forceful practical considerations, counsels otherwise.

C. Upholding the Appellate Court's Decision Would Be Contrary to Congressional Intent.

The legislative history of § 922(g)(9) provides further evidence in favor of rejecting the Sixth Circuit's legal interpretation.

Faced with compelling evidence that gun possession by perpetrators of domestic violence yields chilling results, Congress enacted § 922(g)(9) to keep firearms out of the hands of domestic abusers—full stop. As Senator Lautenberg, the amendment's sponsor, explained, "for many battered women and abused children, whether their abuser gets access to a gun will be nothing short of a matter of life and death."[56] Representative Woolsey similarly emphasized that the amendment was "simple": "Wife-beaters, child abusers, and other domestic violence offenders should not have access to a gun. Period."[57]

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[56] 142 Cong. Rec. 26,675 (1996) (statement of Sen. Lautenberg).

[57] 142 Cong. Rec. 18,544 (1996) (statement of Rep. Woolsey).

Focused on "zero tolerance when it comes to guns" and the national epidemic of "domestic violence,"[58] Congress did not intend for the Lautenberg Amendment's application to be limited to those few states whose misdemeanor statutes mimic the wording of the federal provision. Quite the contrary, in fact: in enacting the Lautenberg Amendment, Congress was focused on *closing* a nationwide "loophole"; at that time, a person convicted of a crime involving domestic violence could, "in over 30 states," still obtain a firearm, as the crimes under which these abusers were convicted—often lesser misdemeanors—did not fall within the purview of federal gun control laws. Section 922(g)(9) was designed to close this gap, broadening the convictions that in turn would subject the perpetrator to gun ownership restrictions.[59] The Lautenberg Amendment thus was designed to look "to the type of crime, rather than the classification of the conviction," in determining whether the convicted misdemeanant should have access to guns.[60] As Senator Lautenberg put it:

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[58] 142 Cong. Rec. 22,985 (1996) (statement of Sen. Lautenberg).

[59] *See* 142 Cong. Rec. 22,985 (1996) (statement of Sen. Lautenberg) ("[M]any people who engage in serious spousal or child abuse ultimately are not charged with or convicted of felonies."); 142 Cong. Rec. 22,988 (1996) (statement of Sen. Feinstein) (noting that "plea bargains often result in misdemeanor convictions for what are really felony crimes."); 142 Cong. Rec. 22,987 (1996) (statement of Sen. Lautenberg) ("The underlying problem is, in this country of ours, that domestic violence, no matter how severe the beating, is often dismissed as a squabble.").

> In over 30 States, even today, beating your wife or your child is a misdemeanor. * * * Two-thirds of domestic violence murders involve firearms. In 150,000 cases of * * * spousal abuse, a gun is present. * * * There is no reason for someone who beats their wi[fe] or abuses their children to own a gun. When you combine wife beaters and guns, the end result is more death.[61]

Congress' intent that the Lautenberg Amendment apply broadly is further evidenced by the fact that the language of the statute was amended before its passage to incorporate an *expanded* definition of "covered crimes." Several proposed modifications had attempted to limit the amendment's application, for example, "only to crimes against intimate partners"; only to offenders "who had been notified [of the prohibition against purchasing guns] when they originally were charged"; or only to "offenders who had been entitled to a jury trial."[62] Each of those narrowing proposals was rejected in favor of the current language—language viewed by the bill's sponsor as "more precise, and probably broader."[63] As Senator Lautenberg put it, it was Congress's "hope that the enforcement of the law will be as rigid as the law very simply defines it. If you beat your wife, if you beat your child, if you abuse your family and you are convicted, even of a misdemeanor, you have no right to possess a gun. That is the way it ought to be."[64] Senator Feinstein echoed that purpose, observing that the statute's broad language will ensure that "[f]ewer abusers will have guns, and fewer of the abused will wake up each morning wondering whether they will live through the day."[65]

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[60] 142 Cong. Rec. 22,988 (1996) (statement of Sen. Feinstein), *see* 142 Cong. Rec. 22,986 (1996) (statement of Sen. Lautenberg) ("The amendment says: Abuse your wife, lose your gun; beat your child, lose your gun; assault your ex-wife, lose your gun; no ifs, ands, or buts.").

[61] 142 Cong. Rec. 22,985, 22,986 (1996).

[62] 142 Cong. Rec. 26,675 (1996) (statement of Sen. Lautenberg).

The Lautenberg Amendment was intended to target "[d]omestic violence, no matter how it is labeled."[66] The Sixth Circuit's decision undermines Congress's intent. It should be reversed.

* * *

The Lautenberg Amendment was passed to take guns out of the hands of misdemeanant domestic abusers. The Sixth Circuit's decision puts guns back in the hands of misdemeanant domestic abusers. The decision disregards the statute's text, it disregards the statute's purpose, and it disregards all common sense. It should be reversed.

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[63] *Id.*

[64] 142 Cong. Rec. 26,676 (1996) (statement of Sen. Lautenberg).

[65] 142 Cong. Rec. 22,988 (1996) (statement of Sen. Feinstein).

[66] 142 Cong. Rec. 22,986 (1996) (statement of Sen. Lautenberg).

CONCLUSION

For the foregoing reasons, and those in the United States' brief, the decision below should be reversed.

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AMICUS
CURIAE
BRIEF

No. 12-1371

IN THE
Supreme Court of the United States

UNITED STATES, *Petitioner*,
v.
JAMES ALVIN CASTLEMAN, *Respondent*.

On Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

Brief *Amicus Curiae* of Gun Owners Foundation, Gun Owners of America, Inc., U.S. Justice Foundation, and Conservative Legal Defense and Education Fund in Support of Respondent

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INTEREST OF THE *AMICI CURIAE*[1]

Gun Owners Foundation, U.S. Justice Foundation, and Conservative Legal Defense and Education Fund are nonprofit educational organizations, exempt from federal income tax under section 501(c)(3) of the Internal Revenue Code ("IRC"), and are public charities. Gun Owners of America, Inc. is a nonprofit social welfare organization, exempt from federal income tax under IRC section 501(c)(4).

The *amici* were established, *inter alia*, for educational purposes related to participation in the public policy process, which purposes include programs to conduct research and to inform and educate the public on important issues of national concern, the construction of state and federal constitutions and statutes related to the rights of citizens, and questions related to human and civil rights secured by law, including the defense of the rights of crime victims, the Second Amendment and the individual right to acquire, own, and use firearms, and related issues. Each organization has filed many *amicus curiae* briefs in this Court and in other federal courts.

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[1] It is hereby certified that counsel for the parties have consented to the filing of this brief; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

At issue in this case is the meaning of "use or threatened use of physical force" as that phrase defines "misdemeanor crime of domestic violence" in 18 U.S.C. Section 921(a)(33)(A)(ii). The court of appeals below found "physical force" to require proof of violent force. The Government contends that the phrase is nothing more than the adoption of a common-law meaning of assault and battery. This would include any uninvited offensive touching or a slight shove or push. To reach this conclusion, the Government has excised "physical" from the statute, leaving only "force," upon which it then has put its common law gloss. By erasing "physical" from the statute the Government has violated the settled canon of statutory interpretation that every word must be rendered "operative," that none be "idle and nugatory."

In an effort to override this rule of construction, the Government cherry picks floor statements from an admittedly "limited drafting history." That effort should be rejected. First, it violates the canon that the statutory words rather than statements of individual legislators determine the legislative purpose. Second, there is nothing even in the quoted statements that supports the adoption of a common law meaning.

In a further effort to evade the plain meaning of "physical force," the Government maintains that Congress has acquiesced to this common-law meaning, because ATF issued a rule in which it parenthetically defined misdemeanor crime of domestic violence as equivalent to an assault and battery. But the

Government has failed to produced any evidence or reason for this interpretation. Moreover, Congress expressly relied on the statutory definition, not the administrative interpretation as recently as 2008, when it enacted the NICS Improvement Act of 2007.

The Government also claims that an MCDV must include the common-law meaning of an assault and battery must be injected because otherwise, at the time of enactment, there were very few states whose statutes would qualify as MCDVs. The Government insists that its common-law theory is necessary lest the MCDV ban become a "practical nullity." This claim is baseless.

By its own terms, the MCDV ban does not operate automatically upon passage, but is contingent upon a conviction under a state misdemeanor statute that each state is free to enact — or not to enact — into law. There is nothing in Section 921(a)(33)(A)(ii) that mandates there be such a law. To the contrary, the MCDV ban was enacted by Congress to aid the states, not to coerce them, as domestic relations is a subject that quintessentially belongs to the States under the Tenth Amendment.

If "physical force" is given the common-law meaning urged by the Government, it would put in jeopardy the constitutional right of "all Americans" to keep and bear arms for the defense of self, family and home, as secured by the Second Amendment to the Constitution. District of Columbia v. Heller, 554 U.S. 570, 581 (2008). According to this Court's opinion in Heller, the right of defense of hearth and home by force of arms lies at the very core of this right. Yet, the Government has argued in favor of an interpretation that would deprive a citizen of his Second Amendment rights when he has been convicted only of a minor offense, such as an assault or battery by an offensive touching or a slight push or shove. Applying the constitutional-doubt canon of interpretation, the words "physical force" ought not be loosely handled in this way. Adopting the Government's position would raise serious constitutional concerns, and should this Court be inclined in that direction, it should order further briefing on the Second Amendment issues that would be raised.

ARGUMENT

I. THE TERM "MISDEMEANOR CRIME OF DOMESTIC VIOLENCE" AS USED IN 18 U.S.C. SECTION 921(a)(33)(A)(ii) HAS NO COMMON-LAW ANALOG.

A. The Text Does Not Support a Common-Law Meaning.

A "misdemeanor crime of domestic violence" ("MCDV") "has, as an element, the use or attempted use of physical force." Throughout its opening brief, the Government labors mightily to convince this Court that this element is satisfied by any misdemeanor statute or ordinance that comports with the common law definition of assault and battery. *See* Brief for the United States ("U.S. Br."), at 13-47. In order to reach this conclusion, the Government reads 18 U.S.C.

Section 921(a)(33)(A)(ii) as if it requires the predicate misdemeanor statute to require any kind of "force" — not "physical force." *See id.* at 11, 15.

The Government rejects the ordinary meaning of "physical force" in favor of the "'more specialized legal usage' ... from common-law battery" where "unlawful force" is understood as embracing "'even the slightest offensive touching.'" *Id.* at 14. Because the common law does not "'draw the line between different degrees of violence,'" the Government insists that the MCDV "force" requirement must "'totally prohibit[] the first and lowest stage of it.'" *Id.* To reach this conclusion, the Government simply disregards the fact that the predicate misdemeanor, as defined by the plain text of 18 U.S.C. Section 921(a)(33)(A)(ii), explicitly does what the common law of assault and battery does not — it distinguishes the degree or quantum of force, by requiring that the element of the predicate misdemeanor must include "physical force," not just "force." In effect, the Government would strip the word "physical" from the statute, leaving only the word "force," in violation of the interpretative canon that "favor[s] a construction which will render every word operative, rather than one which may make some idle and nugatory." Thomas M. Cooley, A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union, 71 (5th ed., Little, Brown: 1883).

The Government repeats this error in its effort to persuade this Court that the meaning of "physical force," as that phrase appears in 18 U.S.C. Section 924(e)(2)(B)(i), is different from the "physical force" language in 18 U.S.C. Section 921(a)(33)(A)(ii). *See* U.S. Br. at 15-18. Referring to both statutes as if they required only "force," not "physical force," the Government conveniently disregards the parallel language on the ground that Section 924(e)(2)(B)(i) applies to a "violent felony," whereas "[t]he 'specialized legal usage' of 'force' from common-law misdemeanor battery comfortably 'fit[s]' when defining the term 'misdemeanor crime of domestic violence.'" *Id.* at 18. In an effort to overcome the presumption that "identical words used in different parts of the same act are intended to have the same meaning,"[2] the Government attempts to denigrate the "noun 'violence'" as it appears in 18 U.S.C. Section 921(a)(33)(A). *Id.* at 19. Noting that Section 921(a)(33)(A) describes a "domestic ... misdemeanor," in contrast with 18 U.S.C. Section 924(e)(2)(B) which describes a "violent felony," the Government argues that "Congress could have just as easily chosen to prohibit the possession of firearms by those convicted of 'misdemeanor crime[s] of domestic abuse,'" rather than domestic violence. *See* U.S. Br. at 19. But Congress never chose that route. The MCDV ban was specifically devised to close an alleged "loophole in the law that essentially allowed a felon who 'got lucky' and had his [violent domestic] offense reduced to a misdemeanor...." K. Fredheim, "Closing the Loopholes in Domestic Violence Laws: The Constitutionality of 18 U.S.C. §922(g)(9), *19 Pace L. Rev. 445, 501* (1999). As the United States District Court for the Northern

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[2] *See* Atlantic Cleaners & Dyers, Inc. v. United States, 286 U.S. 427, 433 (1932).

District of Iowa observed before the enactment of the Lautenberg Amendment:

> [u]nder current Federal law, it is illegal for persons convicted of felonies to possess firearms, yet, many people who engage in serious spousal or child abuse ultimately are not charged with or convicted of felonies. [A]fter a plea bargain, they are, at most, convicted of a misdemeanor. In fact, most of those who commit family violence are never even prosecuted. But when they are, one-third of the cases that would be considered felonies, if committed by strangers, are instead filed as misdemeanors. [United States v. Smith, 964 F. Supp. 286, 292 (N.D. Iowa 1997).]

Inexplicably, after claiming that the MCDV was designed to "'close this dangerous loophole,'" the Government argues that the MCDV definition was crafted not only to include persons whose actions warranted a felony conviction, but also to persons convicted of an "intentional offensive touching." U.S. Br. at 35-36, 38. To reach this conclusion, the Government previously repudiated what it considered to be "[a] narrow definition of 'physical force' [because it] enhance[d] the punishment of only the most violent criminals," which is purportedly "out of place in a statute designed to prevent harms by restricting a wider group of untrustworthy persons from possessing firearms." *Id.* at 21. Unashamedly, the Government would have this Court misuse its judicial power to endorse the Government's extension of the MCDV ban, instead of faithfully applying the limiting words employed by Congress in the governing statute. This Court should decline the Government's invitation to search for a Congressional purpose that is not "derived from the [statutory] text." *See* A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts, p. 56 (West: 2012).

B. The Legislative Record Does Not Support a Common-Law Meaning.

The Government has contended that even though "Section 922(g)(9)'s 'drafting history' is admittedly limited, ... it reveals a general understanding that domestic abusers were often prosecuted under generic assault and battery laws — and that Congress intended such laws to qualify as 'misdemeanor crime[s] of domestic violence' under the newly enacted statutory provision." U.S. Br. at 44. Then, quoting from this Court's "explanation" in United States v. Hayes,[3] the Government has recounted that "Senator Frank Lautenberg, the sponsor of the provision, observed in a floor statement that '[c]onvictions for domestic violence-related crimes often are for crimes, *such as assault*, that are not explicitly identified as related to domestic violence'" *Id.* at 44-45 (italics original). Relying, in part, on this excerpt from the legislative history, the Government has claimed confirmation that "only the common-law meaning of 'force' can effectuate Congress's intent." *Id.* at 44. The Government's contention is misleading and erroneous.

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[3] 555 U.S. 415 (2009).

The Government's argument is misleading because the Hayes Court relied upon the Lautenberg quotation solely for the purpose of reinforcing its conclusion that "a domestic relationship between aggressor and victim often would not be a designated element of the predicate offense." Hayes, 555 U.S. at 428. Indeed, of the four distinct references in Hayes to the legislative record, three (including the one referred to in the Government brief) related to the issue as to whether "the domestic relationship" was required to be an "element of the offense." *Id.* at 428-29. That is decidedly not an issue in this case. Instead, there is no question that the "use or threatened use of physical force" is a required element of a MCDV. And the question here concerns the meaning of that requirement. On that point, the "drafting history" is somewhat more illuminating, as the Hayes opinion indicates:

> Congress did revise the language of §921(a)(33)(A) to spell out the use-of-force requirement. The proposed legislation initially described the predicate domestic-violence offense as a "crime of violence".... The final version replaced the unelaborated phrase "crime of violence" with the phrase "has, as an element, the use or threatened use of physical force, or the threatened use of a deadly weapon." [Hayes, 555 U.S. at 429.]

As Castleman explains in his response brief, this change was calculated "to narrow the scope of the statute," not broaden it. Brief for Respondent ("Resp. Br."), pp. 22-23. And there is no evidence in the legislative record that Senator Lautenberg or any other Senate supporter believed that the change incorporated the common-law meaning into the statute. *See id.* While Senator Lautenberg did suggest generally that the "new definition of covered crimes [was] probably broader," he did not explain this assertion. 142 Cong. Rec. 26,675 (1996). Rather, his commentary on the scope of the new ban was dominated by political rhetoric calculated to mask rather than illumine the practical impact that a "more precise" term would have on the actual enforcement of the amendment:

> I would strongly urge law enforcement authorities to thoroughly investigate misdemeanor convictions on an applicant's criminal record to ensure that none involves domestic violence.... After all, for many battered women and abused children, whether their abuser gets access to a gun will be nothing short of a matter of life or death. [142 Cong. Rec. S. 11,872, 11,878 (Sept. 30, 1996).]

For the Government to suggest that Senator Lautenberg gave voice to a lower threshold of "domestic abuse," such as is contemplated by a simple common-law assault or battery, is simply mistaken.

Moreover, it is altogether problematic to give any weight to floor speeches even by the legislation's sponsor, especially with respect to the meaning of language exacted by others in exchange for their support, as was the case here. *See* U.S. Br. at 19. In any event, there really is no good reason to search for the intent of Congress in any source but the statute itself:

> [I]t could scarcely be affirmed, that the opinions of a few members ... are to be considered as the judgment of the whole house, or even of a majority. But, in truth, little reliance can or ought to be placed upon such sources of interpretation of a statute.... [I]n truth, courts of justice are not at liberty to look at considerations of this sort. We are bound to interpret the act as we find it, and to make such an interpretation as its language and its apparent objects require. We must take it to be true, that the legislature intend precisely what they say, and to the extent which the provisions of the act require, for the purpose of securing their just operation and effect. [Mitchell v. Great Works Milling & Mfg. Co., 17 F.Cas. 496, 498-99 (C.C.D. Me. 1843).]

"What a legislature says in the text of the statute is considered the best evidence of the legislative intent or will." *See* Reading Law at 397. "Even [this Court] gave voice to this view when it said that a statute's language is 'the most reliable evidence of [congressional] intent.'" *Id.*

C. The ATF Regulations Do Not Establish a Common-Law Meaning.

The Government proffers three reasons why the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") regulations establish that the statutory phrase "use or attempted use of physical force" should be given a common-law meaning. The first reason is just plain wrong; the second is unpersuasive; and the third is insupportable.

First, the Government contends that the ATF "has read Section 921(a)(33)(A) in a manner consistent with Senator Lautenberg's interpretation." U.S. Br. at 45. As demonstrated *supra*, there is nothing in the legislative record confirming that Senator Lautenberg gave the "physical force" phrase a common law meaning. Indeed, nothing that Senator Lautenberg said on the floor of the U.S. Senate even purported to give meaning to the phrase. Rather, the Senator's remarks were limited to factual examples of domestic violence that comport with violent force, not merely offensive contact, the latter of which is the hallmark of a common-law assault and battery.

Second, the Government argues that the ATF established by rulemaking that the MCDV is the equivalent of an "assault and battery." U.S. Br. at 45. Both in the rule promulgated and in the explanation for the rule, the ATF placed "e.g., assault and battery" in parentheses. As a parenthetical expression, the ATF committed what the Georgetown University Law Center has labeled "Parenthetical Pitfall # 1: Parentheticals are a poor substitute for legal analysis." The Writing Center, "Parentheticals," p. 4 (2011). The Law Center states:

> Parentheticals can provide an efficient means of communicating basic information about a source. However parentheticals do not explain

> the relationship of the law to your set of facts as express legal analysis.... [*Id.*]

The ATF rule not only failed to provide any legal analysis demonstrating how "assault and battery" implemented the required physical force element of a MCDV, but also the explanation offered by ATF completely begs the question, making no effort to explain why and how the two were linked.

Third, the Government asserts that "Congress has never ... repudiated the ATF's clear understanding that 'assault and battery' offenses are the quintessential example of the sort of misdemeanor offense that would have, as an element, the use of physical force." U.S. Br. at 46. As Castleman has pointed out in his response, the Government has failed to offer any evidence of acquiescence. Resp. Br. at 24-25.

Indeed, in 2008 Congress passed the NICS Improvement Amendment Act of 2007 ("NICS Act"), in which Congress found that one of the primary delays in NICS background checks was the lack of "automated access to information concerning persons prohibited from possessing or receiving a firearm because of ... misdemeanor convictions for domestic violence." Pub. L. 110-180, 121 Stat. 2560, Sec. 2(5)(B). To remedy this shortfall, Section 102(c)(2) of the NICS Act provided that "[t]he State shall make available to the Attorney General, for use by [NICS], records relevant to a determination of whether a person has been convicted in any court of a [MCDV]." *Id.* at 2566. The states were further mandated to "provide information specifically describing the offense and the specific section or subsection of the offense for which the defendant has been convicted and the relationship of the defendant to the victim in each case." *Id.* In order to facilitate this transfer of records, the NICS Act affirmed that "[t]he term, 'misdemeanor crime of domestic violence' has the meaning given to the term in section 921(a)(33) of title 18, United States Code." 121 Stat., Section (3) at 2561. *See also id.* at Section 102(b)(C)(vi). Conspicuously missing is any reference to the ATF regulations. Had Congress acquiesced to the ATF common-law gloss on the statutory definition, it would have said so, especially in an Act the purpose of which was to encourage state and local officials to provide more complete and accurate reports of MCDV convictions. The Government's suggestion to the contrary is without any evidentiary support. *See* U.S. Br. at 46.

II. IT IS IRRELEVANT WHETHER, AT THE TIME THAT THE LAUTENBERG AMENDMENT WAS ENACTED, THERE WERE STATE MISDEMEANOR STATUTES THAT HAD AS AN ELEMENT THE USE OR ATTEMPTED USE OF PHYSICAL FORCE.

The Government urges this Court to disregard the statutory language that an MCDV must have as an element the use or attempted use of physical force, and to substitute therefor the requirement that the predicate misdemeanor need be only a generic common law assault and battery. The Government promotes such a reading lest adherence to the statutory text "thwart [the] undisputed purpose" of Congress to take firearms away from men who beat their wives. *See* U.S. Br. at 46-47. Indeed, the Government has devoted ten pages of its 47-page brief to an effort to convince this Court that the statutory language must be set aside because "it undermines the effective application of Section 922(g)(9) in a manner that Congress could not have intended." *Id.* at 35. The statutory language, the Government asserts, "cannot be the law," because it "would render Section 922(g)(9) a virtual 'dead letter' in all but (at most) a handful of States 'from the very moment of its enactment.'" *Id.* at 40. The Government's argument is baseless.

A. Congress's Intent is Determined by the Statutory Text, Not by Statements of Its Individual Members.

The Government's argument that, by passage of the Lautenberg Amendment, Congress intended to "keep firearms out of the hands of domestic abusers ... who engage in serious spousal or child abuse [but] ultimately are not charged with or convicted of felonies,"[4] is based not on law, but rests entirely upon statements made on the Senate floor by individual Senators. *See* U.S. Br. at 35-36, 44-47. None of those statements purports to be a carefully crafted explanation of the meaning of the statutory text. Rather, made without regard for the statutory language, they are highly emotional remarks — triumphal proclamations of victory over "intense opposition from one of the most powerful special interests in American politics."[5] As Senator Lautenberg celebrated in his closing argument on the Senate floor:

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[4] U.S. Br. at 36.

> We have overcome one road block after the next, and there were times when I did not think we would make it. But throughout it all, the supporters of this bill have always kept in mind that we were fighting for literally a matter of life and death. That knowledge has helped sustain us and make us that much more determined as we have worked our way through the legislative minefield.
>
> So, in the end, we have a glorious victory, a victory for America's frightened, battered women, a victory for our abused children, a victory of life over death.
>
> I am honored and humbled to have been able to play a part in this legislation. We hope that the enforcement of the law will be as rigid as the law very simply defines it. If you beat your wife, if you beat your child, if you abuse your family and you are convicted, even of a misdemeanor, you have no right to possess a gun. That is the way it ought to be. Lord willing, it will be. I yield the floor. [142 Cong. Rec. S. 11,878 (Sept. 30, 1996).]

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[5] 142 Cong. Rec. S 11,872 (Sept. 30, 1996).

Taking these and other similar remarks out of context, the Government insists that Senator Lautenberg's comments are the expressions of the "concerns" and "wants" of the entire Congress, and that "applying Section 922(g)(9) to cover the classic assault and battery statutes that were and are commonly used to prosecute spousal abuse and domestic violence would fill the gap that Congress intended to address." U.S. Br. at 46-47.

But the intent of Congress is not found in the hearts and minds of individual legislators, even of the legislator after whom the MCDV statute is popularly named.[6] Rather, that intent is to be found in "the meaning of the statutory text": "To be 'a government of laws, not of men,' is to be governed by what the laws *say*, and not by what the people who drafted the laws intended." *See* Reading Law at 375. As Justice Oliver Wendell Holmes wrote, "[w]e do not inquire what the legislature meant; we ask only what the statute means." O.W. Holmes, "The Theory of Interpretation," in *Collected Legal Papers* 203, 207 (1920). This canon is especially applicable to "[f]loor statements," even if made while "the [legislative] chamber was full, [for] there is no assurance that everyone present listened, much less agreed." Reading Law at 376. Further, and directly in point here, as Justice Jackson once observed, "political controversies which are quite proper in the enactment of a bill ... should have no place in its interpretation." Schwegmann Bros. v.

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[6] *See, e.g.*, T. J. Halstead, "Firearms Prohibitions and Domestic Violence Convictions: The Lautenberg Amendment" (CRS: October 1, 2001).

Calvert Distillers Corp., 341 U.S. 384, 396 (1951) (Jackson, J., concurring).

B. Adhering to the Statutory Language Defining an MCDV Does Not "Render Section 922(g)(9) a Practical Nullity" As the Government Argues.

The Government contends that to construe Section 921(a)(33)(A)(ii) to require a predicate misdemeanor to have, as an element, "'violent' physical force," as the court of appeals required,[7] "would render Section 922(g)(9) a virtual 'dead letter' ... leav[ing] the provision with little application...." *See* U.S. Br. at 40. This is nonsense.

First, even if, at the time of passage of the Lautenberg Amendment, no state had a misdemeanor statute that qualified under Section 921(a)(33)(A)(ii), Section 922(g)(9) would not have been a "practical nullity" or "dead letter." There is nothing in the United States Code that prevented then, or prevents now, a state from enacting into a law a misdemeanor offense that meets Section 921(a)(33)(A)(ii), and thus to "close the loophole." Section 921(a)(33)(A)(i) contemplates that state legislatures are free to choose whether to enact such a law. Indeed, it would be outside the scope of its constitutional authority for Congress to require a state legislature to enact into law a misdemeanor offense that meets the federal definition. *See* New York v. United States, 505 U.S. 144, 188 (1992).

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[7] U.S. Br. at 38.

To be sure, Section 921(a)(33)(A)(i) contemplates[8] that a Congressionally enacted misdemeanor statute could serve as a predicate misdemeanor (such as a statute applying to the District of Columbia, a federal enclave, etc.), but it certainly does not contemplate that such a law would prohibit acts of domestic violence nationwide. Indeed, if Congress did pass such a statute federalizing prohibitions against domestic violence, it would undoubtedly be found to be engaged in an unconstitutional exercise of the State's police power over domestic matters, reserved to the States by the Tenth Amendment. *See* United States v. Morrison, 529 U.S. 598, 612-19 (2000).

Second, by enacting Section 922(g)(9) as an amendment to the Gun Control Act of 1968, Congress was adding to the list of persons ineligible to possess a firearm in accordance with the statutorily stated purpose of the 1968 Act, namely, "to provide support to Federal, State, and local law enforcement officials in their fight against crime and violence," not "to occupy the field in which such provision operates to the exclusion of the law of any State on the same subject matter." *See* Pub. L. 90-618, 82 Stat. 1213, 1126 (Sec. 101 and 102 (§927)).

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[8] 18 U.S.C. Section 921(a)(33)(A)(i) defines "the term 'misdemeanor crime of domestic violence' [as] an offense that— is a misdemeanor under **Federal**, State, or Tribal law..." (emphasis added).

Third, while Senator Lautenberg and his fellow senators hailed the passage of the Lautenberg Amendment as having closed a "'dangerous loophole' by keeping firearms out of the hands of domestic abusers,"[9] it would be foolhardy to assume that the passage would have any such immediate effect. It would also be presumptuous to assume that the senators expected the new law to apply to past convictions under misdemeanor statutes, the elements of which did not meet the qualifications of Section 921(a)(33)(A)(ii). Yet, that appears to be the assumption of the Government in its brief. *See* U.S. Br. at 36-37. Even if the Lautenberg Amendment had a limited retroactive effect, it would not render it a "practical nullity," as the government has claimed. *See* U.S. Br. at 36.

Finally, had Congress meant the ban to have immediate retroactive impact on persons convicted of a misdemeanor of domestic violence in the past it could have adopted a **fact-based** definition of the predicate misdemeanor, requiring proof that the defendant had, in the past, actually used physical force, instead of a **categorical** definition, based on requisite elements of the misdemeanor statute of conviction. Such could have been the case had Congress enacted the original Lautenberg Amendment, describing the predicate misdemeanor as a "crime of violence." But Congress did not enact such a statute. Instead, Congress chose a categorical definition that required the misdemeanor statute of conviction to have "as an element, the use or attempted use of physical force, or the threat of a deadly weapon." In so doing, Congress limited the immediate impact of the scope of the new law. Enforcing that limitation does not nullify the law, as the Government has contended. Rather, it fulfills the purpose of the law as it is written.

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[9] *See* U.S. Br. at 36.

III. IF SECTION 921(a)(33)(A)(ii) WERE TO BE INTERPRETED AS THE GOVERNMENT HAS ARGUED, IT WOULD PLACE THE CONSTITUTIONALITY OF SECTION 922(g)(9) IN SERIOUS DOUBT.

According to the Government, every person convicted of a common law battery by a single offensive touching (*e.g.*, a push, a shove, or even spitting) has been convicted of an MCDV, if the victim is in one of the domestic relationships set forth in Section 921(a)(33)(A)(ii). As a consequence of that conviction, the person would be subject to criminal prosecution punishable by fine and imprisonment up to 10 years if he or she retained possession of a firearm, or thereafter came into possession of a firearm. *See* 18 U.S.C. Sections 922(g)(9) and 924(a)(2). As a further consequence, such person would be denied access to a firearm for self-defense for life.

This Court recently confirmed that every American has the constitutional right to keep and bear arms for the purpose of self-defense. District of Columbia v. Heller, 554 U.S. 570 (2008). Conviction, or threatened prosecution, of a person for violation of Section 922(g)(9) denies that person access to a firearm to defend himself or herself, his or her family, and his or her home, "where the need for defense of self, family, and property is most acute." *Id.* at 628. If the Government's interpretation of the required MCDV element of "physical force" is given a common-law meaning, requiring no more than an offensive touching, without any proof of any act of violence and without actual use or threatened use of "physical force," the ban would be imposed whenever the victim was a person in a domestic relationship of the person convicted.

There is no doubt that a serious question of constitutionality would be raised by denial of access to a firearm for defense of hearth and home to a person whose misdemeanor conviction — even one arising out of a domestic conflict — was based solely on evidence of a nonviolent act, such as an offensive touch, spitting, or a slight push or shove with no injury. According to the "constitutional-doubt canon," "statutes *ought not* to tread on questionable constitutional grounds unless they do so clearly...." Reading Law at 249. While the Supreme Court may believe that denying a convicted felon access to a firearm is a presumptively constitutional "regulatory measure,"[10] denying such access to a person convicted of a misdemeanor assault and battery as defined by the common law is quite another matter.

Section 921(a)(33)(A)(ii) should be understood according to its terms to avoid an expansive disarming of misdemeanants who have not committed acts of violence. If it is not understood in such a way, the Court should request further briefing on the Second Amendment implications.

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[10] *See* Heller 554 U.S. at 626-27 n.26.

CONCLUSION

Under the Government's theory of the case, a misdemeanor crime of domestic violence does not require violence. The opinion of the Sixth Circuit should be affirmed.

Respectfully submitted,

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Petitioner,
v.
JAMES ALVIN CASTLEMAN,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Sixth Circuit

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STATEMENTS OF INTEREST[1]

Major Cities Chiefs

The Major Cities Chiefs Association is composed of police executives heading the fifty-six largest police departments in the United States, including Atlanta, Chicago, Dallas, Detroit, Los Angeles, New York, Philadelphia, Washington, D.C., and many others, which protect roughly forty percent of America's population. The Major Cities Chiefs Association has filed amicus briefs in numerous cases, including *District of Columbia v. Heller* (No. 07-290), *Moore v. Madigan* (No. 12-1269, 7th Circuit), *Woollard v. Sheridan* (No. 12-1437, 4th Circuit), and *Drake v. Filko* (No. 12-1150, 3rd Circuit).

Association of Prosecuting Attorneys

The Association of Prosecuting Attorneys (APA) was founded as a national organization to represent all prosecutors and provide additional resources such as training and technical assistance in an effort to develop proactive and innovative prosecutorial practices that prevent crime, ensure equal justice, and make our communities safer. The APA acts as a global forum for the exchange of ideas, allowing prosecutors to collaborate with each other and other criminal justice partners. The APA also serves as an advocate for prosecutors on emerging issues related to the administration of justice, among other ways by submitting briefs as amicus curiae in appropriate cases. The APA's board of directors includes current prosecutors from states throughout the nation.

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[1] Pursuant to Supreme Court Rule 37.3(a), the *amici curiae* state that the parties have consented to the filing of this brief and letters of consent have been filed in the office of the Clerk. Pursuant to Supreme Court Rule 37.6, the *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no party made a monetary contribution intended to fund the preparation or submission of this brief. *Amici curiae* further state that no one other than *amici curiae* and their counsel made a monetary contribution to the preparation or submission of this brief. The parties have consented.

International Brotherhood of Police Officers

The International Brotherhood of Police Officers (IBPO) is one of the largest police unions in the country, representing more than 25,000 members. While the IBPO fully supports and defends the Second Amendment right to keep and bear arms, it strongly supports reasonable federal and state gun laws that protect the public and law enforcement officers.

International Association of Chiefs of Police

The International Association of Chiefs of Police is the world's oldest and largest organization of police executives, representing more than 20,000 members in over 100 countries.

Los Angeles City Attorney

The Los Angeles City Attorney's Office is one of the largest municipal law offices in the country. The City Attorney's Office works closely with law enforcement agencies on the local, state, and federal level to prosecute misdemeanor crimes in the City of Los Angeles, including firearm violations and domestic violence. The City Attorney has recently formed a Gun Violence Prevention Unit, dedicated to the prevention of gun violence through the prosecution of cases involving the unlawful use and possession of firearms, coupled with a progressive focus on community outreach, engagement, and education. The City Attorney also has a Family Violence Unit which vertically prosecutes domestic violence, child abuse, and elder abuse crimes. The City Attorney's Office reviews approximately 11,000 domestic violence related cases and prosecutes over 2,600 of those cases each year. The Los Angeles City Attorney's Office is committed to combatting the critical and dangerous issue of possession of firearms by those convicted of domestic violence related misdemeanor crimes.

SUMMARY OF THE ARGUMENT

The ruling of the Sixth Circuit, if affirmed, would frustrate the enforcement of 18 U.S.C. § 922(g)(9), which was enacted by Congress in response to the nationwide problem of firearms and domestic violence. If, as held by the Sixth Circuit, an element of "violent" force is required for a conviction to qualify as a "misdemeanor crime of domestic violence" under Section 922(g)(9), the statute will be inapplicable to domestic abusers convicted under domestic violence laws or generic assault and battery laws that do not draw distinctions between different degrees of force. This restrictive view would permit thousands of domestic abusers to arm themselves, placing their victims and the law enforcement officers called upon to protect them at great risk.

Over one million domestic violence crimes occur every year in the United States. Domestic violence constituted 17% of total violent crimes in 2010. This percentage has been increasing in recent years; despite declining overall violent crime in the past decade, the rate of domestic violence has remained steady. Additionally, the majority of intimate partner homicides in the United States are committed with firearms. The presence of a firearm dramatically increases the likelihood than an episode of domestic violence will result in death. Furthermore, domestic violence often consists of a long pattern of abuse, which begins with verbal aggression and threats that eventually escalate into physical assault. There is, therefore, an immediate need to disarm even those abusers whose criminal actions initially do not amount to the use of "violent" physical force, and the Lautenberg Amendment was enacted to address that need.

Law enforcement officers face grave danger from domestic abusers' access to firearms. Domestic abuse calls constitute the largest category of calls received by police departments each year. Approximately 14% of all police officer deaths occur during a response to domestic violence calls in a single year. Almost all of these officers are killed by a firearm.

The deaths of family members and law enforcement officers at the hands of domestic abusers impose great societal costs, ranging from direct costs, such as the costs of medical and mental health care, to indirect costs from lost productivity and lost lifetime earnings.

If the Sixth Circuit's conclusion that "violent" force is required for purposes of the firearms disability provision stands, then a substantial number of domestic violence convictions will no longer qualify as "misdemeanor crime[s] of domestic violence" under Section 922(g)(9). This would undermine Congress' goal of combating domestic violence and would severely aggravate an already critical public safety crisis. For these reasons, the decision of the Sixth Circuit should be reversed.

ARGUMENT

I. Domestic Violence is a Widespread Crime Made More Lethal when Abusers Have Access to Firearms.

This Court has repeatedly recognized the insidious and pervasive effects of domestic violence in the United States. *See, e.g., Georgia v. Randolph*, 547 U.S. 103, 117 (2006) ("[W]e recognize that domestic abuse is a serious problem in the United States."); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 892 (1992) ("Thirty percent of female homicide victims are killed by their male partners."); *see also Giles v. California*, 554 U.S. 353, 405 (2008) (Breyer, J., dissenting) ("Each year, domestic violence results in more than 1,500 deaths and more than 2 million injuries; it accounts for a substantial portion of all homicides; it typically involves a history of repeated violence; and it is difficult to prove in court because the victim is generally reluctant or unable to testify.").

This Court has also recognized the inherent risks to public safety when domestic abusers have access to firearms. *See United States v. Hayes*, 555 U.S. 415, 427 (2009) ("Firearms and domestic strife are a potentially deadly combination nationwide."); *see also District of Columbia v. Heller*, 554 U.S. 570, 711 (2008) (Breyer, J., dissenting) ("If a resident has a handgun in the home that he can use for self-defense, then he has a handgun in the home that he can use to commit suicide or engage in acts of domestic violence."). Crimes of domestic violence are prevalent and often create unique dangers for responding officers. *See Hiibel v. Sixth Jud. Dist. Ct. of Nev., Humboldt City*, 542 U.S. 177, 186 (2004) ("Officers called to investigate domestic disputes need to know whom they are dealing with in order to assess the situation, the threat to their own safety, and possible danger to the potential victim."); *see also Randolph*, 547 U.S. at 126 (Breyer, J., concurring) ("[L]aw enforcement officers must be able to respond effectively when confronted with the possibility of abuse.") (internal citation omitted). And prosecutors face unique difficulties in domestic violence cases. *See Davis v. Washington*, 547 U.S. 813, 832-33 (2006) ("This particular type of crime is notoriously susceptible to intimidation or coercion of the victim to ensure that she does not testify at trial.").

As illustrated in the following cases, the combination of domestic abuse and firearms can often have deadly consequences:

> Poughkeepsie, New York. February 18, 2011. Officer John Falcone, 44, was shot and killed after responding to a shots fired call. When he arrived at the scene he encountered Lee Welch holding his 3-year-old daughter and waving a gun. Welch fled, still holding the child, with Officer Falcone in pursuit. Officer Falcone was able to rescue the child before engaging in a struggle with Welch as other officers arrived at the scene. During the struggle, Officer Falcone was fatally shot in the head before Welch committed suicide. The suspect's wife, Jessica Welch, was found in a nearby car with a fatal gunshot wound to the head. Jessica had alleged years of domestic abuse and a judge had recently issued a restraining order preventing Lee Welch from having any contact with Jessica due to a prior domestic incident in which it was

> alleged he slammed her head against a wall.[2]
>
> Arlington, Texas. December 28, 2010. Police Officer Jillian Smith, 24, was shot and killed after responding to an apartment on a report of an earlier domestic dispute. The male had already left the apartment when she arrived. Officer Smith was taking the female's report when the male returned unexpectedly. As the man opened fire, Officer Smith positioned herself to shield the woman's 11-year-old daughter, saving the girl but receiving fatal gunshot wounds. The man then chased the woman to a bedroom where he murdered her before killing himself.[3]

The statistics are sobering. According to the Department of Justice, an estimated 1.2 million to 1.5 million domestic violence crimes were committed each year between 2003 and 2012. Jennifer Truman et al., Bureau of Justice Statistics, U.S. Dep't of Justice, *Criminal Victimization 2012*, NCJ 243389 at Table 1 (Oct. 2013).[4] Many more domestic violence crimes are never reported. *See, e.g.*, Timothy C. Hart & Callie Rennison, Bureau of Justice Statistics

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[2] *Officers Gunned Down: How Weak Laws Put Police at Risk, A Report by the Brady Center to Prevent Gun Violence*, at 20 (May 2011), *available at* http://www.bradycenter.org/sites/default/files/Officers-Gunned-Down.pdf (last visited Nov. 13, 2013).

[3] *Id.* at 22.

[4] *Available at* http://www.bjs.gov/content/pub/pdf/cv12.pdf (last visited Nov. 13, 2013).

Special Report, U.S. Dep't of Justice, *Reporting Crime to the Police 1992-2000*, NCJ 195710 at 5 (Mar. 2003).[5] Although the overall violent crime rate has decreased, the number of intimate partner victimizations has remained stable since 2000. Shannan Catalano, Bureau of Justice Statistics, U.S. Dep't of Justice, *Intimate Partner Violence, 1993-2010*, NCJ 239203 at 1 (Nov. 2012).[6] Intimate partner violence has actually increased as a proportion of total violent crimes from 12.5% in 2000 to 17% in 2010. *Id.* at Appendix Table 1.

Domestic assaults are rendered significantly more deadly when abusers have access to firearms. The majority of intimate partner homicides in the United States are committed with firearms. April M. Zeoli & Daniel W. Webster, *Effects of Domestic Violence Policies, Alcohol Taxes and Police Staffing Levels on Intimate Partner Homicide in Large U.S. Cities*, 16 Injury Prevention 90, 90 (2010) (over 60% of intimate partner homicides are committed with firearms). Having one or more guns in the home makes it five times more likely that an episode of domestic violence will result in death. *Id.* Furthermore, domestic violence assaults involving guns are twelve times more likely to result in death than those involving other weapons or bodily force. New Yorkers Against

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[5] *Available at* http://www.bjs.gov/content/pub/pdf/rcp00.pdf (last visited Nov. 13, 2013) (54% of violent and seriously violent crimes committed by intimate partners reported to police).

[6] *Available at* http://www.bjs.gov/content/pub/pdf/ipv9310.pdf (last visited Nov. 13, 2013).

Gun Violence, *Firearms and Domestic Violence*, at 1 (Mar. 2013).[7]

Many such deaths are preventable. Researchers have concluded that abusers who kill "with a firearm would be unable or unwilling to exert the greater physical or psychological effort required to kill with another, typically available weapon." Linda E. Saltzman et al., *Weapon Involvement and Injury Outcomes in Family and Intimate Assaults*, 267 JAMA 3043, 3045 (1992). An analysis of every identifiable mass shooting between 2009 and 2013 found that in 57% of those incidents, the shooter killed a current or former intimate partner or other family member. Mayors Against Illegal Guns, *Analysis of Recent Mass Shootings* (September 2013), at 2.[8] Over the past quarter century, more intimate partner homicides in the United States have been committed with guns than with all other weapons combined. Letter from Professor April M. Zeoli, School of Criminal Justice, Mich. State Univ., to Sens. Patrick J. Leahy & Charles Grassley, Chairman & Ranking Member of the U.S. Senate Comm. On the Judiciary (January 28, 2013).[9]

Guns are also used by batterers to threaten, scare, coerce and intimidate their victims. One study found that 16 out of every 1,000 women in the United States have been threatened with a gun, and 7 in 1,000 women have had a gun used against them by an intimate partner. Susan B. Sorenson, *Firearm Use in Intimate Partner Violence*, 30 Evaluation Rev. 229, 235 (2006).[10] This form of domestic violence is associated with an increase in the risk of homicide. An abuser's previous threats with a weapon or to kill are associated with significantly higher risks for homicide. Jacquelyn C. Campbell et al., *Risk Factors for Femicide in Abusive Relationships: Results from a Multisite Case Control Study*, 93 Am. J. of Pub. Health 1089, at 1092 (2003).[11]

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[7] *Available at* http://nyagv.org/wp-content/uploads/2013/03/Firearms-and-Domestic-Violence-NYAGV.pdf (last visited Nov. 13, 2013).

[8] *Available at* https://s3.amazonaws.com/s3.mayorsagainstillegalguns.org/images/Analysis_of_Mass_Shootings.pdf (last visited Nov. 18, 2013).

[9] *Available at* http://www.judiciary.senate.gov/resources/documents/113thCongressDocuments/upload/013013RecordSubmission-Leahy.pdf (last visited Nov. 18, 2013).

Domestic violence disproportionately affects women. Women are almost four times more likely to be shot by a current or former spouse or boyfriend than by a stranger. Injury and Violence Prevention Program, Wash. St. Dep't of Health, *Firearm-Related Injury*, at 3 (Feb. 2013).[12] Although the number of homicides of women by strangers has decreased over time, the number of female homicides by intimates with firearms has increased. Sorenson, *supra*, at 232. In 2011, an average of 41 women were shot to death each month in the United States by current or former intimate partners. Violence Policy Center, *When Men Murder Women: An Analysis of 2011*

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[10] *Available at* http://www.sp2.upenn.edu/ortner/docs/sorenson_doc10.pdf (last visited Nov. 13, 2013).

[11] *Available at* http://ajph.aphapublications.org/doi/pdf/10.2105/AJPH.93.7.1089 (last visited Nov. 13, 2013).

[12] *Available at* http://www.doh.wa.gov/Portals/1/Documents/Pubs/970006Firearms.pdf (last visited Nov. 15, 2013).

Homicide Data (Sept. 2013), at 6.[13] Alarmingly, women in the United States are eleven times more likely to be murdered with guns than women in other high-income countries. David Hemenway & Erin G. Richardson, *Homicide, Suicide, and Unintentional Firearm Fatality: Comparing the United States with Other High-Income Countries, 2003*, 70 J. Trauma 238, 242 (2011). In the United States, intimate partners account for one third of perpetrators of female homicides, yet just 4% of perpetrators of homicides of men. *See* Zeoli & Webster, *supra*, at 90.

Notwithstanding these grim statistics, laws and policies that prohibit batterers from obtaining access to firearms have reduced the rate of gun violence in domestic settings. According to an analysis of FBI data, 38% fewer women are shot to death by intimate partners in states that require a background check for every handgun sale. Mayors Against Illegal Guns, *Gun Laws and Violence Against Women* (Apr. 2, 2013) (citing U.S. Department of Justice, Federal Bureau of Investigation, Supplementary Homicide Reports, 2010).[14] Other studies indicate that prohibiting violent misdemeanants from possessing guns is associated with a decrease in the risk of arrest for new firearm crimes and violent crimes. Garen J. Wintemute et al., *Subsequent Criminal Activity Among Violent Misdemeanants Who Seek to Purchase Handguns*, 285 JAMA 1019, 1026 (2002).

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[13] *Available at* http://www.vpc.org/studies/wmmw2013.pdf (last visited Nov. 18, 2013).

[14] *Available at* http://libcloud.s3.amazonaws.com/9/e9/e/1726/Gun_Laws_and_Violence_Against_Women.pdf (last visited Nov. 18, 2013).

The social costs associated with domestic violence are significant. The total lifetime medical costs for all United States gunshot injuries sustained in 2010 alone has been estimated at $2.9 billion, of which $1.4 billion were paid by taxpayers. *The Cost of Firearm Violence*, Children's Safety Network.[15] One 2003 study concluded that the costs of domestic violence exceed $5.8 billion annually, with a figure that includes nearly $4.1 billion in direct medical and mental health costs, and nearly $1.8 billion in indirect costs from lost productivity and lost lifetime earnings. Nat'l Ctr. for Injury Prevention and Control, Ctrs. for Disease Control and Prevention, *Costs of Intimate Partner Violence Against Women in the United States*, at 2 (2003).[16] These staggering figures do not take into account other costs such as criminal justice costs, wage losses, and the value of pain, suffering and lost quality of life.

II. Most Domestic Violence Victims Suffer An Escalating Pattern of Abuse that Often Leads to Death.

Domestic violence tends to follow a familiar escalating pattern, which begins with threatening physical behavior and verbal abuse that eventually lead to physical violence and, in some cases, murder. One study estimated that the probability of future injury for a domestic violence victim who experienced no injury in a prior domestic violence incident (i.e., the probability of escalation of domestic abuse) was 83.7%. Alex R. Piquero et al., *Assessing the Offending Activity of Criminal Domestic Violence Suspects: Offense Specialization, Escalation, and De-Escalation Evidence from the Spouse Assault Replication Program*, 121 Pub. Health Rep. 409, 414 (Jul.-Aug. 2006). The Sixth Circuit's analysis would improperly permit perpetrators of these forms of domestic violence—namely abusive battery that does not entail "violent" physical force—to possess firearms contrary to the purpose of 18 U.S.C. § 922(g)(9).

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[15] *Available at* http://www.childrenssafetynetwork.org/sites/childrenssafetynetwork.org/files/CostofFirearmViolence_Print.pdf (last visited Nov. 13, 2013).

[16] *Available at* http://www.cdc.gov/ncipc/pub-res/ipv_cost/IPVBook-Final-Feb18.pdf (last visited Nov. 13, 2013).

Domestic violence can take many forms, including conduct that falls short of severe physical violence, which are strongly correlated with the risk of future injury. Various studies have shown that violence against women is often predicated upon emotionally controlling and verbally abusive behavior. In fact, having a verbally abusive partner is associated with the largest increased odds that a woman will be victimized. Patricia Tjaden & Nancy Thoennes, Nat'l Inst. of Justice & Ctrs. for Disease Control and Prevention, *Extent, Nature, and Consequences of Intimate Partner Violence*, NCJ 181867, at 34-35 (Jul. 2000).[17] Other studies similarly have shown that psychological aggression is a common precursor to physical aggression. In one study, the best predictor of violent physical abuse was the severity of preceding psychological abuse. Kris Henning & Lisa M. Klesges, *Prevalence and Characteristics of*

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[17] *Available at* https://www.ncjrs.gov/pdffiles1/nij/181867.pdf (last visited Nov. 13, 2013).

Psychological Abuse Reported by Court Involved Battered Women, 18 J. Interpersonal Violence 857, 858 (Aug. 2003). Men who have been psychologically abusive in the past are more likely to use a weapon and to injure their spouse or partner. *Id.* at 864.

Because precursor non-violent domestic abuse is a strong indicator of future physical abuse, including murder, there is a strong policy interest in keeping firearms out of the hands of all convicted domestic abusers, regardless of whether their crimes contained "violent" physical force as an element of the offense. Strong evidence of a link between domestic abuse and gun-related violence spurred the enactment of Section 922(g)(9). Congress intended that the new gun ban be applied broadly. 142 Cong. Rec. S11,877 (daily ed. Sept. 30, 1996) (statement of Sen. Lautenberg) ("In my view, anyone who attempts or threatens violence against a loved one has demonstrated that he or she poses an unacceptable risk, and should be prohibited from possessing firearms"). The Sixth Circuit's approach would defeat this objective by allowing thousands of domestic abusers to arm themselves, placing their families, the public and law enforcement in great danger.

III. Law Enforcement Officers Face Ongoing, Intractable Risks When Domestic Abusers Have Access to Firearms

The cocktail of firearms and domestic violence presents grave dangers both to the victims of domestic violence and to the law enforcement officers who are called upon to protect them. The Sixth

Circuit's interpretation of 18 U.S.C. § 922(g)(9) will only exacerbate the already-significant dangers that police officers face every time they respond to a domestic violence call.

There are myriad reasons why domestic violence incidents tend to be particularly volatile, all of which counsel against the Sixth Circuit's construction of 18 U.S.C. § 922(g)(9). As explained by the Chairman and CEO of the National Law Enforcement Officers Memorial Fund:

> No assignment poses more uncertainty and danger to a law enforcement professional than a domestic disturbance call. The circumstances are emotionally charged, and weapons, alcohol and drugs are often involved. An officer who responds as a peacekeeper often becomes a target of the violence.[18]

These risks are far from trivial. "Family disturbance calls . . . constitute the largest single category of calls received by police departments each year." *Randolph*, 547 U.S. at 126 (Breyer, J., concurring) (quoting Helen J. Mederer & Richard J. Gelles, *Compassion or Control: Intervention in Cases of Wife Abuse*, 4 J. Interpersonal Violence 25 (Mar. 1989)). Between 1996 and 2009, 14% of law enforcement officers murdered in the line of duty were killed while responding to domestic violence calls. Shannon Meyer & Randall J. Carroll, *When Officers Die: Understanding Deadly Domestic Violence Calls for Service*, The Police Chief, May 2011, at 24-27.[19] Almost all of these officers (97%) were killed by a firearm. *Id.* In the last three years alone, 149 police officers were killed by gunfire in the United States.[20] Moreover, according to FBI data, in 2009, domestic disturbance calls accounted for 32.6% of assaults on law enforcement officers. Cary Arberg, National Law Enforcement Officers Memorial Fund, *Domestic Disturbances: Deadly, Dangerous Calls.*[21] In that year alone, there were 18,669 assaults on law enforcement officers related to domestic disturbances. *Id.*

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[18] *Domestic Violence Takes a Heavy Toll on Law Enforcement Community*, Campus Safety Magazine, *available at* http://www.campussafetymagazine.com/Channel/Mass-Notification/News/2007/10/09/Domestic-Violence-Takes-a-Heavy-Toll-on-Law-Enforcement-Community.aspx (last visited Nov. 13, 2013).

The prevalence of domestic violence, exacerbated by abusers' ready access to firearms, requires that police departments and other law enforcement agencies expend large amounts of resources to combat the problem. Nationally, 15% to 40% of all calls for police assistance related to domestic violence incidents. Michael G. Breci, *Police Response to Domestic Violence in Crisis Intervention, in* Criminal Justice/Social Service 102, 102 (4th Ed. 2006). Other costs associated with the risk of assault of police officers include "hazardous duty pay, early retirement programs, use of bulletproof vests, and specialized training in backup assistance and weapon retention." J. David Hirschel et al., *The Relative Contribution of Domestic Violence to Assault and Injury of Police Officers*, 11 Justice Quarterly 99, 115 (Mar. 1994).

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[19] *Available at* http://www.policechiefmagazine.org/magazine/index.cfm?fuseaction=display_arch&article_id=2378&issue_id=5 2011 (last visited Nov. 13, 2013)

[20] Law Enforcement Line of Duty Deaths in 2011, Officer Down Memorial Page, *available at* http://www.odmp.org/search/year?year=2011 (last visited Nov. 13, 2013); Law Enforcement Line of Duty Deaths in 2012, Officer Down Memorial Page, *available at* http://www.odmp.org/search/year?year=2012 (last visited Nov. 13, 2013); Law Enforcement Line of Duty Deaths in 2013, Officer Down Memorial Page, *available at* http://www.odmp.org/search/year?year=2013 (last visited Nov. 13, 2013).

[21] *Available at* http://www.nleomf.org/officers/stories/domestic-disturbances.html (last visited Nov. 13, 2013).

The Sixth Circuit's construction of 18 U.S.C. § 922(g)(9) heightens the risks that police officers face every day by permitting convicted domestic violence offenders to have access to firearms, in contradiction of Congress's "manifest purpose" of closing a dangerous loophole in federal firearms legislation. *See Hayes*, 555 U.S. at 427. Accordingly, the Sixth Circuit's decision should be reversed.

IV. The Sixth Circuit's Interpretation of Section 922(g)(9) Frustrates Congressional Intent by Narrowly Defining "Domestic Violence."

The Sixth Circuit's opinion improperly restricts the scope of Section 922(g)(9) predicate offenses. The Sixth Circuit reached its conclusions by grafting this Court's analysis of the statutory definition of the term "violent felony" onto the unrelated statutory category of "misdemeanor crime[s] of domestic violence." The Sixth Circuit's analysis is incorrect under principles of statutory construction and runs contrary to the recognized objectives of Section 922(g)(9).

The Sixth Circuit's decision ignores the fact that, in both common usage and in a technical legal sense, the term "domestic violence" refers to a range of behavior that includes violent as well as non-violent forms of abuse. Nothing in Section 922(g)(9) or its legislative history indicates that Congress intended to create a carve-out that would allow domestic abusers to possess firearms, so long as the their method of abuse does not include "violent" physical force. As this Court has recognized, Section 922(g)(9) was intended to close a loophole under the Gun Control Act of 1968, 18 U.S.C. § 921, et seq. *Hayes*, 555 U.S. at 426. But rather than closing that loophole, the Sixth Circuit's opinion merely opens a new one. Because there is no basis in the text or legislative history of Section 922(g)(9) to construe the statute as requiring the commission of a crime involving "violent" physical force, and because such an interpretation would be contrary to Congress' manifest intent in passing Section 922(g)(9), the ruling of the Sixth Circuit should be reversed.

A. The Sixth Circuit Improperly Relies on the Statutory Definition of the Term "Violent Felony" as Used in the Armed Career Criminal Act.

This Court has recognized that statutory definitions must be construed in light of the context to which they apply. *Johnson v. United States*, 559 U.S. 133, 139-140 (2010) ("Ultimately context determines meaning . . . and we do not force term-of-art definitions into contexts where they plainly do not fit and produce nonsense . . . .") (internal citations and quotations omitted). In *Johnson*, the Court construed the term "physical force," as used in 18 U.S.C. § 924(e)(2)(B)(i), in the context of its application to the "statutory category of violent felon[ies]" that constitute predicate offenses under the Armed Career Criminal Act, 18 U.S.C. § 924(e)(1). 559 U.S. at 140 (internal quotations omitted). The Court concluded that, "in the context of a statutory definition of 'violent felony,' the phrase 'physical force' means violent force—that is, force capable of causing pain or injury to another person." *Id.* The Sixth Circuit improperly applies this interpretation of the term "physical force" to an entirely different "statutory category"—the category of crimes constituting "misdemeanor crimes of domestic violence" under Section 922(g)(9). The Sixth Circuit's approach is incorrect for several reasons.

First, the statutory category of "violent felonies" is not coterminous with the statutory category of "misdemeanor crimes of domestic violence." Indeed, the sources consulted by the Court in *Johnson* that confirmed that the term "violent felony" connotes the use of "strong physical force," 559 U.S. at 140-41, also confirm that the term "domestic violence" contains broader connotations that include non-violent forms of battery. For instance, Black's Law Dictionary defines "domestic violence" as conduct including "[t]he infliction of physical injury, *or the creation of a reasonable fear that physical injury or harm will be inflicted*, by a parent or a member or former member of a child's household, against a child or against another member of the household." Black's Law Dictionary 1601 (9th ed. 2009) (emphasis added).

Other authorities also confirm that the phrase "domestic violence" connotes conduct beyond the types of strong "violent force" necessary to establish a violent felony. *See, e.g., Domestic Violence* in Oxford English Dictionary Online (Oxford University Press, Sept. 2013)[22] (defining "domestic violence" as "violent *or aggressive behaviour* within the home, esp. violent abuse of a partner") (emphasis added). *See also Domestic Violence* in Dictionary of Policing (Willan Publishing, 2008)[23] ("Domestic violence may include physical violence, rape, sexual abuse, stalking, emotional belittling and bullying, and financial hardship."); *Domestic Violence* in Early Childhood Education: An International Encyclopedia (Praeger, 2007)[24] ("Domestic violence can be defined as abuse or threats of abuse between adults in families."); *Domestic Violence* in World of Criminal Justice, Gale (Gale Group, 2001)[25] ("Domestic violence is about control. It is a pattern of coercive behavior that may include physical, sexual, economic, emotional and psychological abuse . . . . If a family or household member repeatedly uses physical force (hitting, slapping, etc.), if they threaten harm to a victim or a victim's children, if they threaten suicide, if they withhold money or food, if they demean the victim, if they force the victim to have sex, if they keep the victim from seeing friends or family then they have perpetrated the crime of domestic violence.").

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[22] *Available at* http://www.oed.com/view/Entry/56663?redirectedfrom=%22domestic+violence%22 (last visited Nov. 19, 2013).

[23] *Available at* http://search.credoreference.com/content/entry/willanpolicing/domestic_violence/0 (last visited Nov. 18, 2013).

[24] *Available at* http://search.credoreference.com/content/entry/abceceduc/domestic_violence/0 (last visited Nov. 18, 2013).

[25] *Available at* http://search.credoreference.com/content/entry/worldcrims/domestic_violence/0 (last visited Nov. 18, 2013).

When viewed in this proper statutory context, "misdemeanor crimes of domestic violence" includes not just acts of strong physical violence, but other forms of offensive touching that create a reasonable fear that physical injury will follow. Such conduct could encompass offenses ranging from battery to robbery to kidnaping to unwanted sexual contact—all of which may be manifestations of domestic violence. *See Hayes*, 555 U.S. at 431 (2009) (Roberts, C.J., dissenting) ("'Use' of force [in the context of 18 U.S.C. §§ 921(a)(33)(A) and 922(g)(9)] is a term that encompasses a variety of conduct, which if listed separately would not pose the objection the majority raises (e.g., commits a battery, robbery or kidnaping)."); *Johnson*, 559 U.S. at 146 (Alito, J., dissenting) ("The term 'force' . . . had a well-established meaning at common law that included even the 'slightest offensive touching.' . . . This approach recognized that an offensive but nonviolent touching (for example, unwanted sexual contact) may be even more injurious that the use of force that is sufficient to inflict physical pain or injury (for example, a sharp slap in the face).").

Additionally, the Court's analysis in *Johnson* relied in significant part upon its prior construction of the statutory definition of the phrase "crime of violence" in 18 U.S.C. § 16. *Johnson*, 559 U.S. at 140 ("The ordinary meaning of this term, combined with §

16's emphasis on the use of physical force against another person . . . suggests a category of violent, active crimes . . . .") (quoting *Leocal v. Ashcroft*, 543 U.S. 1 (2004)). It is inappropriate to apply this same construction to Section 922(g)(9), as the Sixth Circuit did, because the drafters of Section 922(g)(9) considered and ultimately rejected the use of the term "crime of violence" to describe the category of predicate offenses that would trigger the application of the law. *See Hayes*, 555 U.S. at 428 ("The proposed legislation initially described the predicate domestic-violence offense as a 'crime of violence . . . committed by' a person who had a domestic relationship with the victim. 142 Cong. Rec. 5840. The final version replaced the unelaborated phrase 'crime of violence' with the phrase 'has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon.'"). The fact that Congress considered and then rejected the "crime of violence" language indicates its intent for Section 922(g)(9) to cover all categories of domestic violence, not just "violent" battery.

Consequently, the Sixth Circuit improperly limited the scope of Section 922(g)(9) when it relied upon *Johnson's* definition of "physical force." Indeed, this Court expressly declined to expand the definition of "physical force" under the ACCA to misdemeanor crimes of domestic violence. *Johnson*, 559 U.S. at 143-44 ("We do not decide that the phrase has the same meaning in the context of defining a misdemeanor crime of domestic violence. The issue is not before us, so we do not decide it.").

B. Practical Considerations Require Reversal of the Sixth Circuit's Opinion.

Adopting the Sixth Circuit's construction of Section 922(g)(9) would "frustrate Congress's manifest purpose" of prohibiting domestic abusers from possessing firearms. *See Hayes*, 555 U.S. at 427. Congress recognized, prior to the enactment of Section 922(g)(9), that existing federal laws "were not keeping firearms out of the hands of domestic abusers, because 'many people who engage in serious spousal or child abuse ultimately are not charged with or convicted of felonies.'" *Id.* at 426. Moreover, this Court has recognized that Section 922(g)(9) was enacted to close a "dangerous loophole" in federal felon-in-possession laws. *Id.*; *Johnson*, 559 U.S. at 152-53 (Alito, J., dissenting) ("Congress therefore enacted this provision to keep firearms out of the hands of such abusers.").

The Sixth Circuit's ruling reopens this loophole by permitting individuals convicted of nonviolent but "serious spousal or child abuse" to evade the restrictions of Section 922(g)(9). As discussed above, there is simply "no suggestion" in Section 922(g)(9) or its legislative history that Congress intended to limit the application of the statute to predicate offenses involving violent physical force. *See Hayes*, 555 U.S. at 429 ("[The legislative record of the Lautenberg Amendment] contains no suggestion that Congress intended to confine § 922(g)(9) to abusers who had violated statutes rendering the domestic relationship between aggressor and victim an element of the offense.").

The Sixth Circuit's approach nonetheless exempts a substantial number of domestic abusers from the restrictions of Section 922(g)(9), contrary to Congress's intent. Under the Sixth Circuit's approach, domestic abusers convicted of misdemeanor predicate offenses in states in which the generic assault and battery laws do not draw distinctions between different degrees of force could not be convicted under Section 922(g)(9) using the "categorical approach" adopted by this Court. Brief for Petitioner 40, *United States v. Castleman*, No. 12-1371 (U.S. Oct. 1, 2013) ("[T]he Sixth Circuit's] interpretation would render Section 922(g)(9) a virtual 'dead letter' in all but (at most) a handful of States 'from the very moment of its enactment.'") (quoting *Hayes*, 555 U.S. at 426-27). The Sixth Circuit's approach would effectively prevent enforcement of Section 922(g)(9) in those states, even under the "modified categorical approach," because "charging documents frequently simply track the language of the statute, and jury instructions often do not require juries to draw distinctions based on the type of force that the defendant employed." *Johnson*, 559 U.S. at 152 (Alito, J., dissenting).

This Court has declined to make a "dead letter" of Section 922(g)(9) once already. *See Hayes*, 555 U.S. at 427. Indeed, in *Hayes*, the Court effectively sustained a conviction under Section 922(g)(9) based on a predicate offense that did not contain, as an element, the use of violent physical force. *Id.* at 419 n.1 ("West Virginia's battery statute provides: '[A]ny person [who] unlawfully and intentionally makes physical contact of an insulting or provoking nature with the person of another or unlawfully and intentionally causes harm to another person, . . . shall be guilty of a misdemeanor.") (quoting W. Va. Code Ann. § 61-2-9(c)). Nor did the indictment in *Hayes* make reference to any instance of actual use of violent physical force in the commission of the underlying battery. *Id.* at 419 n.2 ("The indictment stated, in relevant part: 'Defendant['s] . . . Battery conviction . . . constituted a misdemeanor crime of domestic violence because . . . [b]attery has, as an element, the use ***and attempted use*** of physical force . . . Defendant . . . committed the offense of Battery against the victim. . . .'") (emphasis added).

Based on the same "practical considerations" that motivated the outcome of *Hayes*—*i.e.*, interpreting the statute in a manner consistent with Congress's "manifest purpose" of prohibiting domestic abusers from accessing firearms—the Sixth Circuit's ruling should be reversed.

CONCLUSION

This Court should reverse the judgment below.

NOVEMBER 22, 2013

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No. 12-1371

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES, *Petitioner,*

v.

JAMES ALVIN CASTLEMAN, *Respondent.*

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF MAYORS AGAINST ILLEGAL GUNS as *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Mayors Against Illegal Guns ("MAIG") is a national, bipartisan coalition of mayors working to make America's communities safer by keeping illegal guns out of dangerous hands and preventing trafficking in illegal guns. Co-founded in 2006 by New York City Mayor Michael Bloomberg and Boston Mayor Thomas Menino, the MAIG coalition comprises more than 1,000 mayors from forty-six states, and includes Republicans, Democrats and Independents from cities and small towns across the nation. The members of MAIG include the chief executives of seven of the country's ten largest cities as well as Memphis, the largest city in Tennessee and home of the Western District of Tennessee, where the events giving rise to this case took place.[2]

The highest responsibility of MAIG's municipal leaders is enforcing the law to protect the people they serve. When interpreted in accordance with its clear statutory language, intent, and purpose, 18 U.S.C. § 922(g)(9)—which prohibits any person convicted of a "misdemeanor crime of domestic violence" from possessing a firearm—makes America's cities and towns safer for domestic violence victims and the law enforcement officers who seek to protect them. MAIG's coalition members are all too familiar with the costs that society bears when guns are in the hands of convicted domestic abusers.

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[1] This brief is submitted pursuant to Rule 37 of the Rules of the Supreme Court of the United States. Counsel for the Petitioner and Respondent have both consented to this submission. No counsel for a party authored this brief in whole or in part, nor did any such counsel or anyone other than *amicus* make any monetary contribution intended to fund the preparation or submission of this brief.

[2] MAIG's membership includes the mayors of three other Tennessee cities: Signal Mountain, Oak Ridge, and Maryville. A list of MAIG's more than 1,000 mayor members is found in the Appendix.

SUMMARY OF ARGUMENT

The United States Court of Appeals for the Sixth Circuit narrowly interpreted a statute—designed to keep guns out of the hands of convicted domestic abusers—in a manner that contradicts the statute's clear language and undermines congressional intent and purpose. Both the text and the legislative history are clear: 18 U.S.C. § 922(g)(9) prohibits gun possession by domestic abusers convicted of using physical force, not just strong and violent physical force, against their victims.

Domestic violence is a "substantial public health problem" with significant economic and societal consequences. National Center for Injury Prevention & Control, *Costs of Intimate Partner Violence against Women in the U.S.* 3 (2003), [hereinafter *NCIPC Report*]. There are over 900,000 cases of domestic violence each year in the United States. Bureau of Justice Statistics, *Intimate Partner Violence, 1993-2010* 1 (2012).

All too often, when guns are present in domestic violence situations, the results are deadly. The statistics are staggering:

- Sixty-four percent of women murdered with guns in 2010 were shot to death by a current or former intimate partner. Press Release, Mayors Against Illegal Guns, *Women and Guns: New Ad and Research Shows How Weak Gun Laws Turn Domestic Abuse Into Murder* (Apr. 3, 2013).

- "Domestic assaults with firearms are approximately twelve times more likely to end in the victim's death than are assaults by knives or fists." *United States* v. *Skoien*, 614 F.3d 638, 643 (7th Cir. 2010) (citing Linda E. Saltzman et al., *Weapon Involvement and Injury Outcomes in Family and Intimate Assaults*, 267 J. AM. MED. ASS'N 3043 (1992)).
- In total, the presence of a gun in domestic violence situations increases the risk of homicide for women by 500%. Jacquelyn C. Campbell et al., *Risk Factors for Femicide within Physically Abusive Intimate Relationships*, 93 AM. J. PUB. HEALTH 1089, 1092 (2003).

This case presents a question of statutory interpretation that is vitally important to keeping guns out of the hands of dangerous domestic abusers: Whether persons like Respondent—a gun trafficker convicted of "intentionally or knowingly" causing bodily injury to the mother of his child—are nonetheless legally entitled to possess firearms despite § 922(g)(9). By plain language, the statute bans the possession of firearms by anyone convicted of a "misdemeanor crime of domestic violence," including those crimes that have, as an element, "the use or attempted use of physical force." 18 U.S.C. § 921(a)(33)(A)(ii).

In a decision that undermines the intent of the statute and is at odds with its plain language, the

Sixth Circuit held that § 922(g)(9) did not prohibit Respondent from possessing firearms—despite his domestic assault conviction—because the state assault statute under which he was convicted did not necessarily require the use of "strong and violent" physical force. For the reasons that follow, this attempt to introduce a significant limiting factor into § 922(g)(9) was in error: § 922(g)(9) plainly encompasses misdemeanors that include physical contact short of violent and strong force.

The most straightforward reading of the statute is that it captures domestic abuse crimes involving "*any* physical force." *United States* v. *Nason*, 269 F.3d 10, 18 (1st Cir. 2001). This is because "[a] person cannot make physical contact—particularly of an insulting or provoking nature—with another without exerting some level of physical force," and not just physical force that can be categorized as both "strong" and "violent." *United States* v. *Griffith*, 455 F.3d 1339, 1342 (11th Cir. 2006); *United States* v. *Smith*, 171 F.3d 617, 621 & n.2 (8th Cir. 1999). Moreover, requiring some heightened amount of force creates an "amorphous legal standard" that is difficult, indeed impossible, to quantify and apply. *United States* v. *Hays*, 526 F.3d 674, 684 (10th Cir. 2008) (Ebel, J., dissenting). This difficulty is illustrated by the varying and inconsistent interpretations applied by those circuit courts that, like the Sixth Circuit, have required some greater degree of force.

Construing § 922(g)(9) consistently with its plain meaning also furthers congressional intent. Congress enacted the law with a clear goal: to prohibit anyone convicted of a domestic violence crime from possessing a firearm. In doing so, Congress recognized the verifiable fact that "[f]irearms and domestic strife are a potentially deadly combination nationwide." *United States* v. *Hayes*, 555 U.S. 415, 427 (2009). Lawmakers understood the need to craft a unique remedy because, unlike other types of crimes against the person, domestic violence commonly persists over a period of time, with the severity of abuse eventually escalating. Thus, "[i]t is only a matter of time before the violence gets out of hand, and the gun results in tragedy." 142 CONG. REC. 22,988 (1996) (statement of Sen. Feinstein).

Lawmakers also knew that domestic abusers are often convicted under state misdemeanor assault and battery laws, most of which—consistent with common law tradition—forbid a wide range of offensive contact short of strong and violent force. Congress meant for § 922(g)(9) to cover the conduct encompassed by those laws when it was inflicted in a domestic context, as shown by the selection of statutory language. It is inconceivable that Congress intended at the time of adopting § 922(g)(9) to exclude from the law's scope the assault and battery laws of twenty-three states that criminalized offensive touching.

In addition to being irreconcilable with the statutory text and legislative intent, the Sixth Circuit's interpretation of § 922(g)(9) threatens to frustrate the public policy underlying numerous state laws and to undermine the efforts of local governments to protect domestic abuse victims and law enforcement personnel. In recent years, many state and local officials—including mayor members of *amicus*—have taken steps to ameliorate the significant costs that domestic violence injuries impose on city and state governments. Effectuating the intended meaning of § 922(g)(9) will keep guns out of the hands of convicted abusers and help states and cities combat domestic violence more effectively.

ARGUMENT

Consistent with longstanding prohibitions on firearm possession by those deemed to pose a serious threat—such as convicted felons and the mentally ill—§ 922(g)(9) prohibits gun possession by persons convicted of a "misdemeanor crime of domestic violence." Such crimes are defined to include crimes that have, as an element, "the use or attempted use of physical force." 18 U.S.C. § 921(a)(33)(A)(ii). Respondent was convicted of misdemeanor domestic assault in Tennessee and—after federal agents later discovered that he was involved in a gun-trafficking operation—he was charged with two counts of violating § 922(g)(9). But the district court dismissed the counts, and a divided Sixth Circuit affirmed, holding that the relevant Tennessee statute was not a predicate offense under § 922(g)(9). *United States* v. *Castleman*, 695 F.3d 582, 590 (6th Cir. 2012).[3]

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[3] Misdemeanor domestic assault under Tennessee law prohibits assaulting a person who is in a covered relationship with the perpetrator. TENN. CODE ANN. § 39-13-111(b) (West 2013). Assault under Tennessee law covers someone who "intentionally, knowingly or recklessly causes bodily injury to another," TENN. CODE ANN. § 39-13-101(a) (West 2013), and "bodily injury," in turn, "includes a cut, abrasion, bruise, burn or disfigurement, and physical pain or temporary illness or impairment of the function of a bodily member, organ, or

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The Sixth Circuit reasoned that the force required to constitute a "misdemeanor crime of domestic violence" must be "strong and violent" and that Tennessee's law did not incorporate any such standard. *Id.* at 588. Its opinion furthered a circuit split as to whether § 922(g)(9) encompasses state misdemeanor crimes that broadly prohibit a range of invasive physical contact or whether it covers only the subset of crimes that require strong and violent physical force.[4] As explained below, the approach followed by the Sixth Circuit cannot be reconciled with the text, legislative intent or purpose of § 922(g)(9); it would also have devastating implications for public safety, and would impose onerous costs on cities across the nation.

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mental faculty." TENN. CODE ANN. § 39-11-106(a)(2) (West 2013).

[4] Three circuit courts have found that § 922(g)(9) covers "crimes characterized by the application of *any* physical force." *Nason*, 269 F.3d at 18 (interpreting Maine assault law); *accord Griffith*, 455 F.3d at 1345; *Smith*, 171 F.3d at 621 & n.2 (interpreting Iowa assault law). Four courts of appeal have found that § 922(g)(9) requires a degree of force greater than offensive physical contact. *See Castleman*, 695 F.3d at 587; *United States* v. *White*, 606 F.3d 144, 153 (4th Cir. 2010) (interpreting Virginia assault and battery law); *Hays*, 526 F.3d at 678-79 (interpreting Wyoming assault and battery law); *United States* v. *Belless*, 338 F.3d 1063, 1068 (9th Cir. 2003) (interpreting Montana assault and battery law). In an immigration case, *Flores* v. *Ashcroft*, the Seventh Circuit interpreted "crime of domestic violence" in 8 U.S.C. § 1227(a)(2)(E) to require force that is "violent in nature." 350 F.3d 666, 668, 670-672 (7th Cir. 2003).

I. THE SIXTH CIRCUIT'S CONSTRUCTION OF § 922(g)(9) IS INCONSISTENT WITH STATUTORY TEXT AND WOULD FRUSTRATE CONGRESSIONAL INTENT.

A. *The Sixth Circuit's Opinion Is Contrary to the Plain Meaning of 18 U.S.C. § 921(a)(33)(A)'s "Use or Attempted Use of Physical Force."*

The Sixth Circuit's opinion effectively adds "strong" and "violent" to the text of § 921(a)(33)(A), which in fact requires merely the "use or attempted use of physical force." *See Lamie* v. *U.S. Tr.*, 540 U.S. 526, 538 (2004) ("With a plain, nonabsurd meaning in view," courts may not "read an absent word into [a] statute."); *Hanover Bank* v. *C.I.R.*, 369 U.S. 672, 687 (1962) (recognizing that when the plain and ordinary language of a statute is clear, the Court is "not at liberty . . . to add to or alter the words employed to effect a purpose which does not appear on the face of the statute").

The circuit courts that have similarly imposed a heightened level of force prerequisite have failed to reach any consensus on what is required, demonstrating that no such standard can be found in the text of the statute. The Fourth Circuit required that the force used be "greater than a mere offensive touching, [and] . . . capable of causing physical pain or injury to the victim," *White*, 606 F.3d at 156, but did not provide guidance as to which factors should be considered when determining whether a particular use of physical force meets this standard. Imposing a different standard, the Tenth Circuit described what it believed did *not* constitute the "use or attempted use of physical force"—but did not describe what would count. *See Hays*, 526 F.3d at 678-79 (stating that "physical force" does not include swatting away pointed finger, jostling, kissing without consent or causing "indirect" contact, such as throwing snowballs, spitballs, paper airplanes or water without causing harm or injury). An opinion affirming the Sixth Circuit's heightened force requirement would exacerbate this problem. Courts across the country would have to determine whether the degree of force encompassed by each state's battery law was sufficiently "strong" and "violent," potentially reaching varying results and creating inconsistent standards for criminal defendants.

This burden and confusion can be avoided by the simple expedient of interpreting the law as Congress wrote it. Lawmakers are presumed to invoke the common law meaning of the terms they use. *See Astoria Fed. Sav. & Loan Ass'n* v. *Solimino*, 501 U.S. 104, 108 (1991). At common law, the crime of battery was characterized by the use of unlawful force against another person. *See United States* v. *Johnson*, 559 U.S. 133, 139 (2010) (citing 2 W. LAFAVE & A. SCOTT, SUBSTANTIVE CRIMINAL LAW § 7.15(a), 301 (1986 and Supp. 2003)); *accord* BLACK'S LAW DICTIONARY 173 (9th ed. 2009). The concept of unlawful force encompassed all forms of offensive physical contact. *Johnson*, 559 U.S. at 139 (defining common law crime of battery as "intentional application of unlawful force against the person of another" including "offensive touching"); 3 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF

ENGLAND 120 (1768); *Lynch* v. *Commonwealth*, 109 S.E. 427, 428 (Va. 1921).

When Congress decided to limit § 922(g)(9)'s prohibition to crimes involving the use or attempted use of "physical force," it incorporated the common law definition of unlawful force.[5] As the law's chief Senate sponsor noted in a floor statement, "convictions for domestic violence-related crimes often are for crimes, *such as assault*, that are not explicitly identified as related to domestic violence." *Hayes*, 555 U.S. at 428 (quoting 142 CONG. REC. 26,675 (statement of Sen. Lautenberg)) (emphasis added). There is no indication that Congress intended to limit the scope of the protection provided in this provision to instances of force that were both strong and violent. Indeed, the legislative record establishes that the only type of abuse Congress intended to exclude from this prohibition was abuse that could be characterized as purely emotional, rather than physical. 142 CONG. REC. 26,675 (1996) (statement of Sen. Lautenberg) ("Some argued that the term crime of violence [in the original bill] was too broad" and could be interpreted to include conduct that is only emotionally abusive, such as "cutting up a credit card with a pair of scissors.").

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[5] The Sixth Circuit incorrectly reasoned that Congress would have used the phrase "misdemeanor domestic assault or battery offense" if it had wanted § 922(g)(9) to reach state common-law assault and battery statutes. *Castleman*, 695 F.3d at 588. But in fact, Congress sought to target any forceful act of "[d]omestic violence, no matter how it is labeled." 142 CONG. REC. 22,986 (1996) (statement of Sen. Lautenberg). Moreover, there was no need to use these more technical references when plain meaning terms would accomplish the same result.

If Congress wanted the statute to extend only to crimes involving "strong" and "violent" domestic violence, it would have so specified. Indeed, Congress could have simply incorporated language that it has used when it wished for legislation to cover only such instances, since it has specified the use of "violent . . . acts of domestic violence" elsewhere in the U.S. code. *See* 8 U.S.C. § 1227(a)(2)(E)(ii) (permitting deportation of any alien who engages in credible threats of violence, repeated harassment or bodily injury to a person for whom a protection order was issued and defining such as any injunction issued to prevent "violent or threatening acts of domestic violence").[6]

B. *The Sixth Circuit's Approach Unduly Restricts the Scope of the Commonly Understood Meaning of "Domestic Violence" in § 922(g)(9).*

The Sixth Circuit's opinion is also at odds with the plain meaning of "domestic violence" in § 922(g)(9) and congressional intent in using the term. Congress intended for § 922(g)(9) to cover the wide range of conduct commonly understood to constitute "domestic violence" without any additional requirement or qualification. *See, e.g.*, 142 CONG.

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[6] *Cf. Whitfield* v. *United States*, 543 U.S. 209, 216 (2005) (noting that Congress has imposed explicit overt act requirement in twenty-two conspiracy statutes, but not in provisions governing conspiracy to commit money laundering); *Franklin Nat'l Bank of Franklin Square* v. *New York*, 347 U.S. 373, 378 (1954) (finding "no indication that Congress intended to make this phase of national banking subject to local restrictions, as it has done by express language in several other instances").

REC. 22,988 (1996) (statement of Sen. Feinstein) ("This amendment looks to the type of crime, rather than the classification of the conviction. *Anyone convicted of a domestic violence offense* would be prohibited from possessing a firearm.") (emphasis added). *See also* Statement on Signing the Omnibus Consolidated Appropriations Act, 1997, 32 WEEKLY COMP. PRES. DOC. 1935, 2 (Sept. 30, 1996) ("As I had urged, the bill also extends the Brady Bill to ensure that those who commit domestic violence cannot purchase guns.").

In drafting the legislation, Congress explicitly considered that the presence of firearms in situations of domestic abuse drastically increases the risk of serious injury—and sought to prevent such harm from occurring by passing § 922(g)(9). *See* 142 CONG. REC. 24,648 (1996) (statement of Sen. Lautenberg) (noting that the presence of a firearm increases the risk of serious injury); 142 CONG. REC. 25,002 (1996) (statement of Sen. Lautenberg) ("[T]he difference between a murdered wife and a battered wife is often the presence of a gun."). Congress also recognized that the then-existing legislative framework prohibited only felons from obtaining firearms, 18 U.S.C. § 922(g)(1) (1994), and was insufficient to establish the desired "*policy of zero tolerance* when it comes to guns and domestic violence." 142 CONG. REC. 19.415 (1996) (statement of Sen. Lautenberg) (emphasis added).[7]

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[7] Lawmakers also considered that many domestic abusers, if they are charged at all, plead down to a misdemeanor even though they had been charged with a felony. *Skoien*, 614 F.3d at 643; *see also* 142 CONG. REC. 22,988 (1996). Accordingly,

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Tellingly, at the time § 922(g)(9) was adopted, twenty-three states had assault and/or battery statutes prohibiting both unlawful offensive touching as well as acts of greater force.[8] Were the Sixth

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§ 922(g)(9) was "enacted in order to remedy the nationwide problem that those convicted of a felony involving domestic assault were prohibited from firearms possession while those convicted of a misdemeanor involving domestic assault were not." *United States* v. *Barnes*, 295 F.3d 1354, 1364 (D.C. Cir. 2002).

[8] ARIZ. REV. STAT. ANN. §13-1203(A) (1996); S.C. CODE ANN. § 16-3-600 (2013); *Mellen* v. *Lane*, 659 S.E.2d 236, 244-45 (S.C. 2008) (defining battery in South Carolina); FLA. STAT. ANN. § 784.03(1)(a) (West 1996); GA. CODE ANN. § 16-5-23(a) (West 1996); IDAHO CODE ANN. § 18-903 (West 1996); 38 ILL. REV. STAT. 12-3 (1996) (current version at 720 ILL. COMP. STAT. ANN. 5/12-3(a)); IND. CODE ANN. § 35-42-2-1(1)(a) (West 1996); KAN. STAT. ANN. § 21–3412 (West 1996) (current version at KAN. STAT. ANN. § 21-5413(a)); ME. REV. STAT. tit. 17-A. § 207 (1996); MD. CODE ANN.. CRIMINAL LAW § 12(a) (West 1996) (current version at MD. CODE ANN., CRIMINAL LAW § 3-201); *Snowden* v. *State*, 583 A.2d 1056, 1058 (Md. 1991) (defining battery in Maryland); MASS. GEN. LAWS ANN. ch. 265, § 13A(a) (West 1996); *Commonwealth* v. *Burke*, 457 N.E.2d 622, 624 (Mass. 1983) (defining assault and battery in Massachusetts); MICH. COMP. LAWS ANN. § 750.81 (West 1996); MICH. COMP. LAWS ANN. § 750.81a (West 1996); *Clarke* v. *K Mart Corp.*, 495 N.W.2d 820, 824 (Mich. Ct. App. 1992) (defining battery in Michigan); MO. ANN. STAT. § 565.070 (West 1996); MONT. CODE ANN. § 45-5-201 (West 1996); N.H. REV. STAT. ANN. § 631:2-a (1996); N.C. GEN. STAT. § 14-33 (West 1996); *Ormond* v. *Crampton*, 191 S.E.2d 405, 410 (N.C. Ct. App. 1972) (defining assault and battery in North Carolina); N.M. STAT. ANN. § 30-3-1 (West 1996); N.M. STAT. ANN. § 30-3-4 (West 1996); N.M. STAT. ANN. § 30-3-12 (West 1996); N.M. Stat. Ann. § 30-3-15 (West 1996); R.I. GEN. LAWS ANN. § 11-5-3(a) (West 1996); *Iacampo* v. *Hasbro, Inc.*, 929 F. Supp. 562, 577 (D.R.I. 1996) (defining assault and battery in Rhode Island); 21 OKLA. STAT. § 642 (2013); *Steele* v. *State*, 778 P.2d 929, 931 (Okla. Crim.

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Circuit's construction of § 922(g)(9) correct, no misdemeanor domestic battery conviction in these states would ever prohibit an abuser from gun possession, because—as in Castleman's case—the key element of the misdemeanors could be satisfied with less than strong and violent force. It is inconceivable that, in establishing a "zero tolerance" policy and prohibiting "anyone convicted of a domestic violence offense" from possessing a gun, Congress would choose to exclude people in nearly half of the states from the core protection offered by § 922(g)(9). Yet, the Sixth Circuit's opinion effectively concluded that this is precisely what Congress did. *Cf. Hayes*, 555 U.S. at 427. This, alone, is ample proof of the Sixth Circuit's legal error and sufficient grounds for reversal.

Furthermore, well-publicized crimes at the time of § 922(g)(9)'s enactment underscore the societal problem that Congress was attempting to remedy. For example, on February 12, 1996, Benito Oliver fatally shot his girlfriend, Galina Komar, in New York City after terrorizing her for two years. Mr. Oliver had been initially subjected to a restraining order for beating Ms. Komar and

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App. 1989) (defining Oklahoma battery law); TENN. CODE ANN. § 39-13-101(a) (West 1996); TEX. PENAL CODE ANN. § 22.01(a) (West 1996); VA. CODE ANN. § 18.2-57(A) (West 1996); VA. CODE ANN. § 18.2-57.2(A) (West 1996); *Lynch*, 109 S.E. at 428 (defining battery in Virginia); WASH. REV. CODE ANN. § 9a.36.041 (West 1996); *State* v. *Davis*, 808 P.2d 167, 172 (Wash. Ct. App. 1991), *aff'd*, 835 P.2d 1039 (Wash. 1992) (defining assault in the fourth degree in Washington); W. VA. CODE ANN. § 61-2-9 (West 1996).

menacing her with a butcher knife. Later, Mr. Oliver was arrested on a misdemeanor charge of stalking Ms. Komar and was released just three weeks prior to the shooting.[9] Upon lowering bail in the case, a state court judge noted that while Ms. Komar had suffered some bruising, she had not suffered any disfigurement and suggested that Mr. Oliver would leave Ms. Komar alone if she gave his dog back to him. Far from leaving her alone, Mr. Oliver walked into the auto dealership where she worked, shot and killed her, and then turned the gun on himself.

Congress was certainly aware of this incident, as evidence of the crime was submitted to the Congressional Record on the same day that Senator Lautenberg introduced the bill that would establish

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[9] Under the New York Penal Law in 1996, a person was guilty of stalking "when, with intent to harass, annoy or alarm another person: 1. He or she strikes, shoves, kicks or otherwise subjects such other person to physical contact, or attempts or threatens to do the same; or 2. He or she follows a person in or about a public place or places; or 3. He or she engages in a course of conduct or repeatedly commits acts which alarm or seriously annoy such other person and which serve no legitimate purpose," N.Y. PENAL LAW § 240.26 (McKinney 1996), or "when: 1. He or she intentionally places or attempts to place another person in reasonable fear of physical injury, serious physical injury or death by displaying a deadly weapon, dangerous instrument or what appears to be a pistol, revolver, rifle, shotgun, machine gun or other firearm; or 2. He or she repeatedly follows a person or engages in a course of conduct or repeatedly commits acts over a period of time intentionally placing or attempting to place another person in reasonable fear of physical injury, serious physical injury or death," N.Y. PENAL LAW § 120.14 (McKinney 1996).

§ 922(g)(9). *See* 142 CONG. REC. 5762 (1996) (including, as exhibit, John Leo, *Stupid Court Tricks*, U.S. NEWS & WORLD REP., Mar. 18, 1996). Moreover, public protest followed the incident, demanding that crimes of domestic violence be taken more seriously. Matthew Goldstein, *Judge's Courtroom Tactics Focus of Hearing*, N.Y.L.J., Dec. 17, 1996, at 36. By enacting § 922(g)(9), Congress sought to keep guns out of the hands of domestic violence offenders like Benito Oliver. Had § 922(g)(9) been in effect and understood to include misdemeanors of offensive physical contact, Mr. Oliver may have been prevented from obtaining a firearm.[10]

For all of these reasons, "domestic violence" as used in § 922(g)(9) is best understood as intended by

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[10] There were a number of additional tragic and preventable domestic violence-related murders leading up to the passage of § 922(g)(9), including most notably: Teddy Lee Prichard's shooting of his wife, Sharon, his eight-year-old son Josey and his nine-year-old daughter Cassandra with a shotgun after Sharon had filed half a dozen domestic violence complaints against him; Larry Buttz's shooting of his wife and two children in their beds after his wife had filed a complaint against him for simple assault a month before; Michael Cartier's murder of Kirstin Lardner, daughter of investigative reporter George Lardner, following Cartier's recent conviction for beating up a previous girlfriend; and Terry Douglas Shaifer's killing of his estranged wife outside of his daughter's elementary school after his wife had pressed charges against him for battery several years earlier. *Relatives Say Man Killed His Family Out of Love*, ASSOCIATED PRESS, July 11, 1993; Susan Stocum, *Four Dead in Shooting Following Domestic Violence Complaint*, ASSOCIATED PRESS, Nov. 5, 1996; Tina Rosenberg, *Fatal Attraction*, N.Y. TIMES, Dec. 10, 1995; Wendy Melillo & David Montgomery, *Murder-Suicide: Family's Troubles Took Tragic Turn*, WASH. POST, Sept. 26, 1996, at B1.

Congress—to embrace the broad, common meaning of the term without confinement by analyzing the strength of the violence. Any narrower interpretation would frustrate Congress's intent to address the full range of conduct that constitutes domestic violence and can lead to such horrific consequences if the abuser has access to a firearm.

II. THE SIXTH CIRCUIT'S INTERPRETATION THREATENS TO FRUSTRATE THE PUBLIC POLICY OF NUMEROUS STATE AND LOCAL GOVERNMENTS AND CREATES SUBSTANTIAL PUBLIC SAFETY RISKS.

A. *Since 1996, State and Local Governments Have Taken Substantial Steps to Address Domestic Violence.*

Since § 922(g)(9) was enacted, state and local policymakers have actively sought to curb the substantial individual and societal harms caused by domestic violence. In 1996, "only about one-third of the States had criminal statutes that specifically proscribed domestic violence." *Hayes*, 555 U.S. at 427 (emphasis omitted). But since 1994, "more than 660 new state laws" have been enacted to combat domestic violence. A.C.R. 150, 215th Leg., 1st Ann. Sess. (N.J. 2012).

Today, every state has legislation addressing domestic violence,[11] and there is a broad network of

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[11] *See Domestic Violence in the States: Domestic Violence Legislation*, Domestic Violence, Sexual Assault and Stalking Data Res. Ctr., http://www.jrsa.org/dvsa-drc/dv-all.shtml (last

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governmental, nonprofit and academic organizations dedicated to addressing the problems caused by such crimes.[12] In addition, the vast majority of municipalities across the country have established a range of services dedicated to addressing issues related to domestic violence, such as victim advocate programs, secure housing options and specialized training for law enforcement agents.[13]

State and municipal governments take the existing federal framework into account when crafting their own policy responses to the domestic violence problem. In 1997, for instance, the Nevada legislature explicitly referenced the then-new federal scheme when it passed a reform package "to

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visited Nov. 19, 2013) (listing domestic violence statutes in every state); *see also* U.S. Department of Health and Human Services, *Navigating the Family Violence Prevention and Services Program* 4 (2012) ("Each state has codified 'domestic violence' for civil and criminal remedies with definitions varying across the country.").

[12] *See Domestic Violence in the States: Domestic Violence Projects*, Domestic Violence, Sexual Assault and Stalking Data Res. Ctr., http://www.jrsa.org/dvsa-drc/dv-projects.shtml (last visited Nov. 19, 2013); *State Coalition List*, National Coalition Against Domestic Violence, http://www.ncadv.org/resources/StateCoalitionList.php (last visited Nov. 19, 2013).

[13] *See* U.S. Conference of Mayors, *City Responses to Domestic Violence: A 77-City Survey* 3 (2010); *see also* National Institute of Justice, *Practical Implications of Current Domestic Violence Research: For Law Enforcement, Prosecutors and Judges* 1 (2009) ("A total of 77 percent of police departments have written operational procedures for responding to emergency domestic violence calls, and larger departments are most likely to have such written procedures.").

strengthen Nevada's domestic violence laws and to provide a more comprehensive approach and response to incidents of domestic violence." Nevada State Legislature, Leg. Counsel Bureau Research Div., Bill Summary, AB 170, 69th Reg. Sess., at 2 (1997). While debating whether to impose certain enhanced penalties on domestic abusers, lawmakers considered § 922(g)(9)'s firearms ban for those convicted of "misdemeanor crimes of domestic violence" when determining how to more effectively "combat[] violence against women." *Id.* at 80-81, 94-95. Thereafter, Nevada enacted its prohibition on "battery which constitutes domestic violence," NEV. REV. STAT. ANN. § 200.485 (2013), and expressly incorporated Nevada's existing battery statute, *see* NEV. REV. STAT. ANN. § 200.481 (2013)—which, in turn, broadly criminalizes offensive touching, *Hobbs* v. *State*, 251 P.3d 177, 179 (Nev. 2011).[14] As the Sixth Circuit interpreted § 922(g)(9), however, no one convicted of a misdemeanor domestic battery offense in Nevada would be prohibited from possessing a gun. The Sixth Circuit's interpretation of § 922(g)(9) would undermine the Nevada legislature's intention in every respect.

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[14] In *Hobbs*, the Supreme Court of Nevada held that the defendant was properly convicted of "battery which constitutes domestic violence" when—after barging into a nail salon where his ex-girlfriend was receiving a manicure—he screamed at her and spit in her face. 251 P.3d at 178. (The defendant then went into the salon parking lot and smashed the windshield of her car with a rock. *Id.*) The court reasoned that, consistent with common law understandings, "battery is the intentional and unwanted exertion of force upon another," which includes spitting. *Id.* at 180. Under the Sixth Circuit's reasoning, however, the statute under which the defendant was convicted would not be a predicate offense under § 922(g)(9).

B. *The Sixth Circuit's Holding Would Exclude Domestic Violence Crimes in More than Half the States from the Ambit of § 922(g)(9).*

The Sixth Circuit's holding threatens to undermine state and local efforts to combat domestic violence. Today, the assault and battery laws of twenty-eight states, the federal government and the District of Columbia encompass both unlawful offensive physical contact and more extreme physical force, and would—under the Sixth Circuit's logic—be excluded as § 922(g)(9) predicate offenses.[15] Other state crimes, including some from Tennessee, also criminalize various forms of offensive physical contact. These include, for example, crimes against unwanted sexual touching, criminal exposure and intentional contact with bodily fluids or waste.[16] All

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[15] *See* U.S. Br. at 40, App. B, *Johnson* v. *U.S.*, 559 U.S. 133 (2010) (No. 08-6925).

[16] *See, e.g.*, TENN. CODE ANN. § 39-13-109 (West 2013) ("A person commits the offense of criminal exposure of another to human immunodeficiency virus (HIV), to hepatitis B virus (HBV), or to hepatitis C virus (HCV) when, knowing that the person is infected with HIV, with HBV, or with HCV, the person knowingly . . . [e]ngages in intimate contact with another.") (criminal exposure); *id.* § 39-13-505 ("Sexual battery is unlawful sexual contact with a victim by the defendant or the defendant by a victim accompanied by any of the following circumstances. . . .") (sexual battery); *see also* DEL. CODE ANN. tit. 11, § 601(a) (West 2013) ("A person is guilty of offensive touching when the person: (1) Intentionally touches another person either with a member of his or her body or with any instrument, knowing that the person is thereby likely to cause

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these acts are consistent with the cycle of violence characteristic of abusive intimate relationships, but would not be covered by § 922(g)(9) under the Sixth Circuit's logic.

Reducing the number of crimes that could constitute a § 922(g)(9) predicate offense would allow a greater number of convicted offenders to retain access to firearms. This would put abuse victims at significant risk of violence.

The city of Chicago provides a telling example. In 2006, the city received 204,729 domestic-related calls for help, at an average of 561 calls per day. Leslie Landis, *Assessment of the Current Response to Domestic Violence in Chicago* 3 (City of Chicago Mayor's Office on Domestic Violence 2007). The most commonly reported domestic violence crime was

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offense or alarm to such other person; or (2) Intentionally strikes another person with saliva, urine, feces or any other bodily fluid, knowing that the person is thereby likely to cause offense or alarm to such other person.") (offensive touching); 18 PA. CONS. STAT. ANN. § 2709(a) (2013) ("A person commits the crime of harassment when, with intent to harass, annoy or alarm another, the person: (1) strikes, shoves, kicks or otherwise subjects the other person to physical contact, or attempts . . . to do the same.") (harassment); S.D. CODIFIED LAWS § 22-18-26.1 (2013) ("Any person who, with the intent to assault, throws, smears, spits, or causes human blood, vomit, saliva, mucus, semen, excrement, urine, or human waste to come in contact with any other person, is guilty of a Class 1 misdemeanor.") (intentional contact with bodily fluids or waste); UTAH CODE ANN. § 76-5-102.9 (West 2013) ("Any person who knowingly or intentionally throws or otherwise propels any bodily substance or material listed under Subsection (1) at another person is guilty of a class B misdemeanor.") (propelling a bodily substance).

simple battery, which under Illinois law includes both offensive touching and more extreme force. 720 ILL. COMP. STAT. ANN. 5/12-3 (West 2013). Domestic battery-bodily harm was also the tenth most-frequent arrest charge, constituting 7,901 arrests—far outweighing aggravated domestic battery arrests (130), physical contact arrests (1,941), and domestic battery with prior domestic convictions (49). Landis, *supra* at 3. If the Sixth Circuit's opinion were to stand, the vast majority of Chicago's domestic violence incidents and arrests would not be covered by § 922(g)(9), and those convicted of domestic violence would still be entitled to legally possess firearms under federal law—precisely what Congress sought to prevent.

C. *The Sixth Circuit's Holding Would Impose Onerous Burdens on Cities Across the Country.*

Were the Sixth Circuit's construction of § 922(g)(9) the law imposed nationwide, it would put in harm's way the municipal officials who respond to domestic violence incidents—including social workers, child welfare officers, and law enforcement personnel—increasing public safety risks and raising the public costs associated with incidents of domestic violence.

Police officers are at particularly high risk when responding to domestic violence calls, especially when firearms are involved. Responses to domestic violence between 2003 and 2012 accounted for over six percent of all situations in which law enforcement officers were feloniously killed. FBI, *Law Enforcement Officers Killed and Assaulted 2012* Table 19, Table 27 (2012); *see also Skoien*, 614 F.3d at 643 (noting that "[a]pproximately 8% of officers' fatalities from illegal conduct during 1999 through 2008 arose from attempts to control domestic disturbances."). From 2003 to 2012, more police officers were killed responding to reports of domestic violence than were killed responding to drug-related arrests, burglaries in progress and handling or transporting prisoners combined.[17] FBI, *Law Enforcement Officers Killed and Assaulted 2012* Table 19 (2012). Furthermore, abused women made ninety-six percent more calls to police if their partner used a knife or gun against them, Amy E. Bonomi et al., *Severity of Intimate Partner Violence and Occurrence and Frequency of Police Calls*, 21 J. INTERPERSONAL VIOLENCE 1354, 1360 (2006). This suggests that, when police receive a report of domestic violence, they are more likely to confront a situation that presents a significant threat to their safety.

In addition to fostering the protection of both civilians and municipal officers, state and local efforts to address domestic violence have been driven by the substantial public costs of domestic violence, which are amplified by firearms. The Centers for Disease Control and Prevention ("CDC") estimates that, of the more than 4.5 million incidents of physical assault by intimate partners each year, medical care is required for roughly 520,000 of them. *NCIPC Report*, *supra* at 15, 29. The average cost to treat each incident is $2,665, *id.* at 29, which is paid for in part by public funds, *see id.* at Table 9.[18] In addition, as a result of intimate partner physical assault, one in six victims reports time lost from paid work, and about one in ten reports lost time from household responsibilities. *Id.* at 18, Table 6, 31, Table 14. The CDC estimates that the overall loss of productivity from such violence is approximately $900 million dollars nationwide. *Id* at 31. These costs impose substantial burdens on cities across the country, including those led by *amicus*' members.

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[17] Ninety-two percent of law enforcement officers feloniously killed from 2003 to 2012 were killed by firearms. FBI, *Law Enforcement Officers Killed and Assaulted 2012* Table 27 (2012).

State and local lawmakers are acutely aware of these costs. This year, for instance, the Tennessee Economic Council on Women ("TECW")[19] released a

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[18] In 1995, the direct costs of medical and mental health care due to domestic violence were more than $4 billion. Elizabeth Richardson Vigdor & James A. Mercy, *Do Laws Restricting Access to Firearms by Domestic Violence Offenders Prevent Intimate Partner Homicide?*, 30 EVAL. REV. 313, 314 (2006). Furthermore, "victims of intimate partner and sexual violence make more visits to health providers over their lifetime, have more hospital stays, have longer duration of hospital stays, and are at risk of a wide range of physical, mental, reproductive, and other health consequences over their lifetime than non-victims." Michele C. Black et al., National Center for Injury Prevention & Control, *National Intimate Partner and Sexual Violence Survey: 2010 Summary Report* 61 (2011).

[19] "The One Hundredth General Assembly created the Tennessee Economic Council on Women (TCA § 4-50-101, et seq.) to address the economic concerns and needs of women in Tennessee . . . . The Council consults with and reports to the Governor, the Women's Legislative Caucus, the General Assembly and the pertinent agencies, departments, boards, commissions and other entities of State and local governments on matters pertaining to women." Tennessee Economic Council

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comprehensive report to the Tennessee General Assembly on the economic effect of domestic violence in the state, and the impact is staggering. Testimony from numerous witnesses established that twenty to thirty-seven percent of all women seeking emergency medical care do so as a result of domestic violence. TECW, *The Economic Impact of Violence Against Women in Tennessee* 24 (2013). Overall, when women ages eighteen to sixty-four are victims of domestic violence, they are one and a half times more likely to visit the emergency room, two times more likely to seek mental health care, and six times more likely to seek help for substance abuse, imposing direct costs on the state and raising insurance premiums for all state residents. *Id.* at 24. The report also discussed the productivity losses incurred as a result of the almost 55,000 reported cases of domestic violence against working women in the state in 2012. *Id.* at 31. Indeed, the President of the Cumberland County Plant Managers Association testified that one in five days of work missed by employees was the result of domestic violence. *Id.* at 32.

* * *

Finally, a proper, uniform application of § 922(g)(9) is crucial to ensure the effectiveness of the federal system used to keep prohibited individuals from acquiring guns. Between 1994 and 2012, convictions under the domestic violence prohibitions of § 922(g)(9) have been second only to

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on Women, *The Economic Impact of Violence Against Women in Tennessee* iii (2013).

felonies as a basis for licensed dealers to deny gun sales after running the National Instant Criminal Background Check System ("NICS"). Over that same period, federal, state and local governments have denied an estimated 250,000 gun sales because a would-be purchaser had been convicted of a misdemeanor crime of domestic violence.[20] In total, nearly sixteen percent of the total firearm transfer denials made by the FBI are based on domestic violence. Bureau of Justice Statistics, DOJ, *Background Checks for Firearm Transfers, 2010—Statistical Tables* Table 4 (Feb. 2013).

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[20] Background checks are conducted by the FBI and—in so-called "point-of-contact" states that run their own background checks—by state and local agencies. Between the inception of the NICS system in 1998 and 2012, 101,393 gun sales were federally denied due to a misdemeanor crime of domestic violence conviction. Additionally, 42,459 gun sales were federally denied due to restraining or protection orders for domestic violence, making a total of 143,852 federal denials related to domestic violence. *See* FBI, *National Instant Background Check System Operations 2012* (2012).

Between 1999 and 2010, state and local agencies issued a total of 945,915 denials, and it is estimated they have issued 150,000 denials in the two years since data was last released. Bureau of Justice Statistics, DOJ, *Background Checks for Firearms Transfers, 2010–Statistical Tables*, Table 2 (Feb. 2013); Mayors Against Illegal Guns, *Felon Seeks Firearm, No Strings Attached* 4 (Sept. 2013). For state and local agencies that reported reasons for these denials, 13.2% were denials for domestic violence reasons—which would represent another 144,000 domestic violence denials. Thus, the combined federal, state and local background check system has almost certainly issued over 250,000 denials due to domestic violence-related criteria since its inception.

Each of these denials represents a potential life—or lives—saved. The Sixth Circuit's misreading of the statutory text and disregard for the legislative intent must not be permitted to put these lives at risk and disrupt the effective protections afforded to individuals and society by a proper interpretation of § 922(g)(9).

CONCLUSION

For the reasons set forth herein, the decision below should be reversed.

Dated: November 22, 2013

Respectfully submitted,

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Mayor Johnny Ford, Tuskegee, AL
Mayor Larry Bryant, Forrest City, AR
Mayor Arnell Willis, Helena, AR
Mayor Lawrence Owens, Hughes, AR
Mayor McKinzie Riley, Wrightsville, AR
Mayor Marie Rogers, Avondale, AZ
Mayor Greg Stanton, Phoenix, AZ
Mayor Mark Mitchell, Tempe, AZ
Mayor Adolfo Gamez, Tolleson, AZ
Mayor Jonathan Rothschild, Tucson, AZ
Mayor Marie Gilmore, Alameda, CA
Mayor Timothy Knox, Amador City, CA
Mayor Leon Garcia, American Canyon, CA
Mayor Wade Harper, Antioch, CA
Mayor Elizabeth Patterson, Benicia, CA
Mayor Tom Bates, Berkeley, CA
Mayor Sherman Schapiro, Blue Lake, CA
Mayor Raymond Miller, Brisbane, CA
Mayor Fred Gaines, Calabasas, CA
Mayor Evan Low, Campbell, CA
Mayor Jason Burnett, Carmel-by-the-Sea, CA
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Mayor Pro Term Joseph M. Lyons, Claremont, CA
Mayor Eugene Montanez, Corona, CA
Mayor Diane Furst, Corte Madera, CA
Mayor Joseph Krovoza, Davis, CA
Mayor Gary Davis, Elk Grove, CA
Mayor Jennifer West, Emeryville, CA
Mayor Teresa Barth, Encinitas, CA
Mayor John Reed, Fairfax, CA

Mayor Bill Harrison, Fremont, CA
Mayor Maria Orozco, Gonzales, CA
Mayor Dennis Brazil, Gustine, CA
Mayor Daniel Juarez, Hawthorne, CA
Mayor Michael Sweeney, Hayward, CA
Mayor Susan Jones, Healdsburg, CA
Mayor Connie Boardman, Huntington Beach, CA
Mayor James Butts, Inglewood, CA
Mayor Art Madrid, La Mesa, CA
Mayor Robert Ring, Laguna Woods, CA
Mayor Dan Hillmer, Larkspur, CA
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Mayor Bob Foster, Long Beach, CA
Mayor Eric Garcetti, Los Angeles, CA
Mayor Rob Schroder, Martinez, CA
Mayor Mary Ann Lutz, Monrovia, CA
Mayor Paul Eaton, Montclair, CA
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Mayor Alan Nagy, Newark, CA
Mayor Pat Eklund, Novato, CA
Mayor Jean Quan, Oakland, CA
Mayor Gabriel Jimenez, Orange Cove, CA
Mayor Amy Worth, Orinda, CA
Mayor Stephen Pougnet, Palm Springs, CA
Mayor H. Gregory Scharff, Palo Alto, CA
Mayor Bill Bogaard, Pasadena, CA
Mayor Luis Molina, Patterson, CA
Mayor David Glass, Petaluma, CA
Mayor John Chiang, Piedmont, CA
Mayor Michael Harris, Pleasant Hill, CA
Mayor Elliott Rothman, Pomona, CA
Mayor Ellis Green, Port Hueneme, CA
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Mayor Deborah Robertson, Rialto, CA

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Mayor Mark Bartel, San Jacinto, CA
Mayor Chuck Reed, San Jose, CA
Mayor Stephen Cassidy, San Leandro, CA
Mayor Jan Marx, San Luis Obispo, CA
Mayor Gary Phillips, San Rafael, CA
Mayor Miguel Pulido, Santa Ana, CA
Mayor Helene Schneider, Santa Barbara, CA
Mayor Don Lane, Santa Cruz, CA
Mayor Pam O'Connor, Santa Monica, CA
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Mayor Anthony Silva, Stockton, CA
Mayor Anthony Spitaleri, Sunnyvale, CA
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Mayor Osby Davis, Vallejo, CA
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Mayor Michael Hancock, Denver, CO
Mayor Randy Penn, Englewood, CO
Mayor Marjorie Sloan, Golden, CO
Mayor Carolyn Cutler, Lafayette, CO
Mayor Bob Murphy, Lakewood, CO
Mayor Robert Muckle, Louisville, CO
Mayor Marc Snyder, Manitou Springs, CO
Mayor Joe Gierlach, Nederland, CO
Mayor Joyce Downing, Northglenn, CO

Mayor Don Stephens, Salida, CO
Mayor Andrew Muckle, Superior, CO
Mayor Stuart Fraser, Telluride, CO
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Mayor Michael Pavia, Stamford, CT
Mayor Ryan Bingham, Torrington, CT
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Mayor Vincent Gray, Washington, DC
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Mayor Diane Hanson, Dewey Beach, DE
Mayor Kenneth Branner, Middletown, DE
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Mayor Charles Sanders, Greenwood, FL
Mayor Joy Cooper, Hallandale Beach, FL
Mayor Peter Bober, Hollywood, FL
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Mayor Barrington Russell, Lauderdale Lakes, FL
Mayor Richard Kaplan, Lauderhill, FL
Mayor Howard Schieferdecker, Maitland, FL
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Mayor Dominic Persampiere, Oviedo, FL
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Mayor Edward Malloy, Fairfield, IA
Mayor Matt Hayek, Iowa City, IA
Mayor Buck Clark, Waterloo, IA
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Mayor Joel Fritzler, Carbondale, IL
Mayor Harriet Rosenthal, Deerfield, IL
Mayor John Rey, DeKalb, IL
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Mayor Elizabeth Tisdahl, Evanston, IL
Mayor Rodney Craig, Hanover Park, IL
Mayor Michael Howley, Hickory Hills, IL
Mayor Nancy Rotering, Highland Park, IL
Mayor Joseph Tamburino, Hillside, IL
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Mayor Phil O'Dwyer, Berkley, MI
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Mayor Dave Bing, Detroit, MI
Mayor James Wiley, Douglas, MI
Mayor Diane Goddeeris, East Lansing, MI

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Mayor Chris Coleman, St. Paul, MN
Mayor Harold Sanger, Clayton, MO
Mayor Michael Hallauer, Houston Lake, MO
Mayor Sylvester James, Kansas City, MO
Mayor Arthur McDonnell, Kirkwood, MO
Mayor Randall Rhoads, Lee's Summit, MO
Mayor Daniel DiPlacido, Rock Hill, MO
Mayor Francis Slay, St. Louis, MO
Mayor Shelley Welsch, University City, MO
Mayor Cecil Belle, Abderdeen, MS
Mayor Johnny DuPree, Hattiesburg, MS
Mayor Robert Boykin, Macon, MS
Mayor Velma Jenkins, Shuqualak, MS
Mayor McArthur Straughter, Yazoo City, MS
Mayor Russell Nelson, Belgrade, MT
Mayor Sean Becker, Bozeman, MT
Mayor John Engen, Missoula, MT
Mayor Terry Bellamy, Asheville, NC
Mayor Walter Goodenough, Carolina Shores, NC
Mayor Mark Chilton, Carrboro, NC
Mayor Mark Kleinschmidt, Chapel Hill, NC
Mayor Darryl Moss, Creedmoor, NC

Mayor Bill Bell, Durham, NC
Mayor Barbara Mallett, East Spencer, NC
Mayor Arthur Schools, Emerald Isle, NC
Mayor Robert Perkins, Greensboro, NC
Mayor James O'Geary, Henderson, NC
Mayor Tom Stevens, Hillsborough, NC
Mayor Jackie Holcombe, Morrisville, NC
Mayor Lee Bettis, Jr., New Bern, NC
Mayor Jaqueline Sergent, Oxford, NC
Mayor Nancy McFarlane, Raleigh, NC
Mayor Victor Varela, Ronda, NC
Mayor J. Allen Joines, Winston-Salem, NC
Mayor Dennis Walaker, Fargo, ND
Mayor Eric Spear, Portsmouth, NH
Mayor Fred Tagliarini, Aberdeen, NJ
Mayor Ed Johnson, Asbury Park, NJ
Mayor Robert Critelli, Atco, NJ
Mayor Lorenzo Langford, Atlantic City, NJ
Mayor Mark Smith, Bayonne, NJ
Mayor Matthew Doherty, Belmar, NJ
Mayor David Mayer, Blackwood, NJ
Mayor Raymond McCarthy, Bloomfield, NJ
Mayor Patrick McHale, Bogota, NJ
Mayor James Cann, Bordentown, NJ
Mayor Albert Kelly, Bridgeton, NJ
Mayor Dana Redd, Camden, NJ
Mayor Chuck Cahn, Cherry Hill, NJ
Mayor Michael Blunt, Chesilhurst, NJ
Mayor Janice Kovach, Clinton, NJ
Mayor Sophie Heymann, Closter, NJ
Mayor M. James Maley, Collingswood, NJ
Mayor Dennis Roohr, Cookstown, NJ
Mayor Thomas Hannen, Cranford, NJ
Mayor Kenneth Paris, Delran, NJ
Mayor James Dodd, Dover, NJ

Mayor Joseph Smith, East Newark, NJ
Mayor Robert Bowser, East Orange, NJ
Mayor Antonia Ricigliano, Edison, NJ
Mayor J. Christian Bollwage, Elizabeth, NJ
Mayor Carlos Colina, Emerson, NJ
Mayor Colleen Mahr, Fanwood, NJ
Mayor Mark Sokolich, Fort Lee, NJ
Mayor Warren Cooper, Frenchtown, NJ
Mayor Joseph Delaney, Garfield, NJ
Mayor Guy Piserchia, Gillette, NJ
Mayor Gerald Drasheff, Guttenberg, NJ
Mayor Maria DiGiovanni, Hackettstown, NJ
Mayor Domenick Stampone, Haledon, NJ
Mayor Raymond McDonough, Harrison, NJ
Mayor Rose Heck, Hasbrouck Heights, NJ
Mayor John DeRienzo, Haworth, NJ
Mayor Richard Goldberg, Hawthorne, NJ
Mayor Gary Minkoff, Highland Park, NJ
Mayor Dawn Zimmer, Hoboken, NJ
Mayor Timothy McDonough, Hope, NJ
Mayor Paul Anzano, Hopewell, NJ
Mayor Wayne Smith, Irvington, NJ
Mayor Steven Fulop, Jersey City, NJ
Mayor Michael Ryan, Lake Como, NJ
Mayor David DelVecchio, Lambertville, NJ
Mayor John DeSimone, Leonia, NJ
Mayor Richard Gerbounka, Linden, NJ
Mayor Mauro Raguseo, Little Ferry, NJ
Mayor Marc Schreiks, Lodi, NJ
Mayor Frank Minor, Logan Township, NJ
Mayor Kenneth Short, Long Valley, NJ
Mayor Nicholas Russo, Longport, NJ
Mayor Michael Beck, Lower Township, NJ
Mayor Robert Conley, Madison, NJ
Mayor William Laforet, Mahwah, NJ

Mayor Susan Cohen, Manalapan, NJ
Mayor Michael Fressola, Manchester Township, NJ
Mayor Victor DeLuca, Maplewood, NJ
Mayor Frank North, Merchantville, NJ
Mayor Patrick O'Hagan, Midland Park, NJ
Mayor James Gallos, Milford, NJ
Mayor Sandra Haimoff, Millburn, NJ
Mayor Robert Jackson, Montclair, NJ
Mayor Dennis Vaccaro, Moonachie, NJ
Mayor Timothy Dougherty, Morristown, NJ
Mayor J. Brooke Hern, New Providence, NJ
Mayor Cory Booker, Newark, NJ
Mayor Peter Massa, North Arlington, NJ
Mayor Francis Womack, North Brunswick, NJ
Mayor Randy George, North Haledon, NJ
Mayor Linda Schwager, Oakland, NJ
Mayor Owen Henry, Old Bridge, NJ
Mayor Dwayne Warren, Orange, NJ
Mayor James Rotundo, Palisades Park, NJ
Mayor James Barberio, Parsippany-Troy Hills, NJ
Mayor Alex Blanco, Passaic, NJ
Mayor Jeffrey Jones, Paterson, NJ
Mayor Wilda Diaz, Perth Amboy, NJ
Mayor Harry Wyant, Phillipsburg, NJ
Mayor Sharon Robinson-Briggs, Plainfield, NJ
Mayor Jesse Tweedle, Pleasantville, NJ
Mayor Donna Moore, Port Norris, NJ
Mayor Liz Lempert, Princeton, NJ
Mayor Pasquale Menna, Red Bank, NJ
Mayor Paul Aronsohn, Ridgewood, NJ
Mayor Linda Schaefer, Ringwood, NJ
Mayor Sandy Moscaritolo, River Edge, NJ
Mayor Dave Fried, Robbinsville, NJ
Mayor Jamel Holley, Roselle, NJ
Mayor Joe Accardi, Roselle Park, NJ

Mayor Kevin Glover, Scotch Plains, NJ
Mayor Michael Gonnelli, Secaucus, NJ
Mayor Alex Torpey, South Orange, NJ
Mayor Nicholas Poliseno, Spotswood, NJ
Mayor Mohammed Hameeduddin, Teaneck, NJ
Mayor Peter Rustin, Tenafly, NJ
Mayor Clifton People, Union, NJ
Mayor Brian Stack, Union City, NJ
Mayor Joanne Minichetti, Upper Saddle River, NJ
Mayor Thomas Giordano, Waldwick, NJ
Mayor Richard Turner, Weehawken, NJ
Mayor Robert Parisi, West Orange, NJ
Mayor Shing-Fu Hsueh, West Windsor, NJ
Mayor John Birkner, Westwood, NJ
Mayor Julia Allen, Whitehouse Station, NJ
Mayor Jacqueline Jennings, Willingboro, NJ
Mayor John McCormac, Woodbridge, NJ
Mayor Jeffrey Goldsmith, Woodcliff Lake, NJ
Mayor Keith Kazmark, Woodland Park, NJ
Mayor Barbara Cottam, Angel Fire, NM
Mayor Joe Murrieta, Grants, NM
Mayor Kenneth Miyagishima, Las Cruces, NM
Mayor Ray Alborn, Ruidoso, NM
Mayor David Coss, Santa Fe, NM
Mayor Albert Campos, Santa Rosa, NM
Mayor Darren Cordova, Taos, NM
Mayor Gloria Chavez, Tijeras, NM
Mayor Robert Crowell, Carson City, NV
Mayor Carolyn Goodman, Las Vegas, NV
Mayor Gerald Jennings, Albany, NY
Mayor James Gaughan, Altamont, NY
Mayor Ann Thane, Amsterdam, NY
Mayor Peter Porcino, Ardsley, NY
Mayor Randy Casale, Beacon, NY
Mayor Matthew Ryan, Binghamton, NY

Mayor James Schoenig, Brewster, NY
Mayor Eugene Christopher, Broadalbin, NY
Mayor Byron Brown, Buffalo, NY
Mayor G. Wayne McIlroy, Carthage, NY
Mayor Joseph Keegan, Castleton, NY
Mayor Jerome Kobre, Chestnut Ridge, NY
Mayor John Lane, Clinton, NY
Mayor Jeff Katz, Cooperstown, NY
Mayor Mark Evans, Coxsackie, NY
Mayor Randy Sterling, Dryden, NY
Mayor Allan Kasprzak, East Aurora, NY
Mayor Paul Rickenbach, East Hampton, NY
Mayor Mitchell Levinn, East Nassau, NY
Mayor Henry Doerr, Elbridge, NY
Mayor Jeffrey Kaplan, Ellenville, NY
Mayor James Matthews, Ellisburg, NY
Mayor Stephen Sommers, Fabius, NY
Mayor Mark Olson, Fayetteville, NY
Mayor John Diamond, Glens Falls, NY
Mayor Dayton King, Gloversville, NY
Mayor Jean Celender, Great Neck Plaza, NY
Mayor Ralph Kreitzman, Great Neck Village, NY
Mayor Barbara Moore, Greenwood Lake, NY
Mayor Emery Cummings, Hammondsport, NY
Mayor Ronald Belmont, Harrison, NY
Mayor Peter Swiderski, Hastings-on-Hudson, NY
Mayor Michael Kohut, Haverstraw, NY
Mayor Natale Tartamella, Head of the Harbor, NY
Mayor Wayne Hall, Hempstead, NY
Mayor Richard Beirman, Herrings, NY
Mayor Joseph Lee, Hilton, NY
Mayor Shawn Hogan, Hornell, NY
Mayor Brian Smith, Irvington, NY
Mayor Svante Myrick, Ithaca, NY
Mayor Samuel Teresi, Jamestown, NY

Mayor Susan Lopatkin, Kensington, NY
Mayor Shayne Gallo, Kingston, NY
Mayor Robert Blais, Lake George, NY
Mayor Ronald Cooper, Lake Success, NY
Mayor Anne McAndrews, Larchmont, NY
Mayor Martin Oliner, Lawrence, NY
Mayor Carl Luft, Lima, NY
Mayor Corrine Kleisle, Lyons, NY
Mayor Barbara Clark, Madison, NY
Mayor Patricia McDonald, Malverne, NY
Mayor Dennis Leahy, Maybrook, NY
Mayor Anthony Sylvester, Mechanicville, NY
Mayor Terry Grimshaw, Mexico, NY
Mayor Richard Donovan, Minoa, NY
Mayor James Purcell, Monroe, NY
Mayor Jeffrey Oppenheim, Montebello, NY
Mayor Gordon Jenkins, Monticello, NY
Mayor Ernest Davis, Mount Vernon, NY
Mayor Noam Bramson, New Rochelle, NY
Mayor Mike Bloomberg, New York, NY
Mayor Peter Blandino, Newark, NY
Mayor Judith Kennedy, Newburgh, NY
Mayor Paul Dyster, Niagara Falls, NY
Mayor Laura Nolan, North Haven, NY
Mayor Marvin Natiss, North Hills, NY
Mayor Joseph Maiurano, Norwich, NY
Mayor Jen White, Nyack, NY
Mayor Linda Witte, Olean, NY
Mayor Richard Miller, Oneonta, NY
Mayor William Hanauer, Ossining, NY
Mayor Christopher Piccola, Palmyra, NY
Mayor Paul Pontieri, Patchogue, NY
Mayor Mary Foster, Peekskill, NY
Mayor Anthony Fratto, Phoenix, NY
Mayor Christopher Sanders, Piermont, NY

Mayor Peter Scherer, Pleasantville, NY
Mayor Robert Weitzner, Port Washington, NY
Mayor John Bruno, Ravena, NY
Mayor Daniel Dwyer, Rensselaer, NY
Mayor Kevin Neary, Richmondville, NY
Mayor Thomas Richards, Rochester, NY
Mayor John Durkin, Roslyn, NY
Mayor Jeffrey Schwartzberg, Roslyn Estates, NY
Mayor Grant Rohrmoser, Sandy Creek, NY
Mayor Clyde Rabideau, Saranac Lake, NY
Mayor Scott Johnson, Saratoga Springs, NY
Mayor Gregge Harrian, Savona, NY
Mayor Gary McCarthy, Schenectady, NY
Mayor John Patterson, Sherman, NY
Mayor Ken Wray, Sleepy Hollow, NY
Mayor Karen Strickland, South Dayton, NY
Mayor Geoffrey Prime, South Floral Park, NY
Mayor Mark Epley, Southampton, NY
Mayor Letty Rudes, Speculator, NY
Mayor Joyce Lobene, Spencerport, NY
Mayor Dagan LaCorte, Suffern, NY
Mayor Edward Stewart, Sylvan Beach, NY
Mayor Stephanie Miner, Syracuse, NY
Mayor Drew Fixell, Tarrytown, NY
Mayor Ronald Pilozzi, Tonawanda, NY
Mayor Louis Rosamilia, Troy, NY
Mayor A. Martin Petrovic, Trumansburg, NY
Mayor Beth Greenwood, Tully, NY
Mayor Michael Esmay, Upper Nyack, NY
Mayor Theodore Young, Waterloo, NY
Mayor Michael Manning, Watervliet, NY
Mayor Brian McCoy, Wayland, NY
Mayor David Goldsmith, Wesley Hills, NY
Mayor Scott Burto, West Carthage, NY
Mayor John Ramundo, West Haverstraw, NY

Mayor Thomas Roach, White Plains, NY
Mayor Mike Spano, Yonkers, NY
Mayor Anthony Leone, Yorkville, NY
Mayor Dan Pillow, Addyston, OH
Mayor Donald Plusquellic, Akron, OH
Mayor Bernard Baronowski, Andover, OH
Mayor Deborah Sutherland, Bay Village, OH
Mayor Daniel Pocek, Bedford, OH
Mayor Fletcher Berger, Bedford Heights, OH
Mayor Ben Kessler, Bexley, OH
Mayor Samuel Alai, Broadview Heights, OH
Mayor David Seagraves, Brookville, OH
Mayor William Healy, Canton, OH
Mayor Tammy Drobina, Carroll, OH
Mayor Diana Stockmaster, Centerburg, OH
Mayor Mark Mallory, Cincinnati, OH
Mayor Frank Jackson, Cleveland, OH
Mayor Edward Kelley, Cleveland Heights, OH
Mayor Michael Coleman, Columbus, OH
Mayor William Armentrout, Creston, OH
Mayor Gary Leitzell, Dayton, OH
Mayor Terry Lindeman, Doylestown, OH
Mayor Gary Norton, East Cleveland, OH
Mayor Ted Andrzejewski, East Lake, OH
Mayor James Swoger, East Liverpool, OH
Mayor Holly Brinda, Elyria, OH
Mayor Patricia Burnside, Englewood, OH
Mayor Bill Cervenick, Euclid, OH
Mayor Thomas Nagel, Fairborn, OH
Mayor Charles Johnson, Forest Park, OH
Mayor Gary Middlemus, Frazeysburg, OH
Mayor Kirk Emmert, Gambier, OH
Mayor Dave Nelson, Geneva-on-the-Lake, OH
Mayor Mark Williams, Genoa, OH
Mayor Alan Zaffiro, Golf Manor, OH

Mayor Ray DeGraw, Grandview Heights, OH
Mayor Lance Westcamp, Groveport, OH
Mayor Richard Verga, Harveysburg, OH
Mayor Clifford Mason, Hebron, OH
Mayor Lou Bertrand, Hiram, OH
Mayor Susan Pelkowski, Holloway, OH
Mayor William Currin, Hudson, OH
Mayor Rich Blankenship, Ironton, OH
Mayor Jerry Fiala, Kent, OH
Mayor Deborah Neale, Lakeline, OH
Mayor Richard Justice, Lakemore, OH
Mayor David Berger, Lima, OH
Mayor Jo Ann Toczek, Linndale, OH
Mayor Chase Ritenauer, Lorain, OH
Mayor Patricia Fallot, Louisville, OH
Mayor Joseph Cicero, Lyndhurst, OH
Mayor Donald Kuchta, Macedonia, OH
Mayor Steve Adams, Malvern, OH
Mayor Jeffrey Lansky, Maple Heights, OH
Mayor Joe Matthews, Marietta, OH
Mayor Bruce Rinker, Mayfield Village, OH
Mayor Robert Schwab, McComb, OH
Mayor Glenn Holmes, McDonald, OH
Mayor Richard Cain, Mineral City, OH
Mayor James Waller, Minerva, OH
Mayor Susan Renda, Moreland Hills, OH
Mayor Mike Porter, Mount Gilead, OH
Mayor Charles Neff, Mount Sterling, OH
Mayor Jeffrey Wherley, Nellie, OH
Mayor James Friel, Newcomerstown, OH
Mayor Daniel Brooks, North College Hill, OH
Mayor Terrance McConnell, North Kingsville, OH
Mayor Ed Klco, North Perry, OH
Mayor Kathy Mulcahy, Orange Village, OH
Mayor Richard Bain, Pepper Pike, OH

Mayor Billy Spencer, Piketon, OH
Mayor Timothy Redden, Plymouth, OH
Mayor David Malone, Portsmouth, OH
Mayor Daniel Ursu, Richmond Heights, OH
Mayor William Nibert, Richwood, OH
Mayor William Flaute, Riverside, OH
Mayor Earl Leiken, Shaker Heights, OH
Mayor Patrick Monahan, Shawnee Hills, OH
Mayor John Smith, Silverton, OH
Mayor Georgine Welo, South Euclid, OH
Mayor Matthew Brett, South Russell, OH
Mayor Warren Copeland, Springfield, OH
Mayor William Burkhardt, St. Bernard, OH
Mayor Domenick Mucci, Steubenville, OH
Mayor Clayton Weller, Sugarcreek, OH
Mayor Michael Bell, Toledo, OH
Mayor Susan Infield, University Heights, OH
Mayor Mary Myers, Verona, OH
Mayor Doug Franklin, Warren, OH
Mayor Bradley Sellers, Warrensville Heights, OH
Mayor Allen Patchin, West Farmington, OH
Mayor Ann Schreiner, West Millgrove, OH
Mayor Kim Maggard, Whitehall, OH
Mayor William Margalis, Wickliffe, OH
Mayor Richard Bonde, Willowick, OH
Mayor Susan Farley, Woodlawn, OH
Mayor Charles Sammarone, Youngstown, OH
Mayor Jeff Tilton, Zanesville, OH
Mayor Fred Phillips, Butte Falls, OR
Mayor Mike Morgan, Cannon Beach, OR
Mayor Ted Crawford, Dundee, OR
Mayor Gary Schirado, Durham, OR
Mayor Kitty Piercy, Eugene, OR
Mayor Peter Truax, Forest Grove, OR
Mayor Shane Bemis, Gresham, OR

Mayor Charlie Hales, Portland, OR
Mayor Christine Lundberg, Springfield, OR
Mayor Sandra Larson, Veneta, OR
Mayor James Hopely, Aldan, PA
Mayor Dwan Walker, Aliquippa, PA
Mayor Ed Pawlowski, Allentown, PA
Mayor Charles Wahl, Ambler, PA
Mayor Gretchen Dosch, Applewold, PA
Mayor Bernard Killian, Aspinwall, PA
Mayor Barbara Burke, Auburn, PA
Mayor Doris Howell, Avondale, PA
Mayor Alexander Bennett, Baldwin, PA
Mayor Phillip Ferrizzi, Bally, PA
Mayor Donald Wunderler, Bath, PA
Mayor Robin Gochenauer, Bendersville, PA
Mayor Verncel Creveling, Berwick, PA
Mayor John Callahan, Bethlehem, PA
Mayor Robert Myers, Birdsboro, PA
Mayor Joseph Caugherty, Blairsville, PA
Mayor Anthony Gross, Blawnox, PA
Mayor Vincent Liebel, Boswell, PA
Mayor Marianne Deery, Boyertown, PA
Mayor Tom Riel, Bradford, PA
Mayor Kenneth Lockhart, Brentwood, PA
Mayor Robert Lebo, Bristol, PA
Mayor David Wonderling, Brookville, PA
Mayor Lester Ward, Brownsville, PA
Mayor Anna Marie Quader, Burgettstown, PA
Mayor Loyce Harpster, Burnham, PA
Mayor Margaret Stock, Butler, PA
Mayor David Rhome, Canonsburg, PA
Mayor Justin Taylor, Carbondale, PA
Mayor Donald Baumgarten, Castle Shannon, PA
Mayor Barbara Schlegel, Catasauqua, PA
Mayor James Perry, Chalfant, PA

Mayor Marilyn Becker, Chalfont, PA
Mayor Peter Lagiovane, Chambersburg, PA
Mayor Ronald Lockwood, Cherry Valley, PA
Mayor John Linder, Chester, PA
Mayor Paul McKenna, Churchill, PA
Mayor Richard Lattanzi, Clairton, PA
Mayor Andrea Estadt, Clarion, PA
Mayor Harry Kelly, Clarks Summit, PA
Mayor James Schell, Clearfield, PA
Mayor John Hartman, Cleona, PA
Mayor Frank Kelly, Collingdale, PA
Mayor Daniel Rutland, Colwyn, PA
Mayor Joseph Carrelli, Conyngham, PA
Mayor Anthony Celeste, Coraopolis, PA
Mayor Gail Knauf, Cressona, PA
Mayor Timothy Carroll, Dallas, PA
Mayor Helen Thomas, Darby, PA
Mayor Donald Wachter, Darlington, PA
Mayor John Lignelli, Donora, PA
Mayor Thomas Lloyd, Dormont, PA
Mayor Richard Pope, Dover, PA
Mayor Josh Maxwell, Downingtown, PA
Mayor Libby White, Doylestown, PA
Mayor Philip Krivacek, Duquesne, PA
Mayor Betty Hays, Eagles Mere, PA
Mayor Louis Payne, East Pittsburgh, PA
Mayor Mark Pacilla, East Washington, PA
Mayor Salvatore Panto, Easton, PA
Mayor J. Edward Cook, Edgewood, PA
Mayor Wayne Murphy, Edgeworth, PA
Mayor Ray Plummer, Ehrenfeld, PA
Mayor Joseph Cisco, Ellport, PA
Mayor Anthony Court, Ellwood City, PA
Mayor Dorothy Quinn, Emsworth, PA
Mayor Joseph Sinnott, Erie, PA

Mayor Cassandra Coleman-Corcoran, Exeter, PA
Mayor D. Gary Evans, Factoryville, PA
Mayor Ronald Besong, Fair Oaks, PA
Mayor Charles Moore, Falls Creek, PA
Mayor Olive McKeithan, Farrell, PA
Mayor Gary McBrien, Felton, PA
Mayor Robert Frey, Folcroft, PA
Mayor Nicholas Cost, Forest City, PA
Mayor Marty O'Malley, Forest Hillsboro, PA
Mayor Jose Rosado, Fountain Hill, PA
Mayor Fred Moyer, Freeburg, PA
Mayor Gerald Yob, Freemansburg, PA
Mayor James Swartz, Freeport, PA
Mayor William Miller, Girard, PA
Mayor Edward Burns, Girardville, PA
Mayor Charles Hammer, Green Tree, PA
Mayor Arnie Bowser, Greensboro, PA
Mayor Ronald Silvis, Greensburg, PA
Mayor Roy Del Rosario, Hamburg, PA
Mayor Linda Thompson, Harrisburg, PA
Mayor Norm Hawkes, Hatboro, PA
Mayor Ronald Cyphert, Hawthorn, PA
Mayor Kenneth LaSota, Heidelberg, PA
Mayor John Hoerner, Highspire, PA
Mayor Joseph Dodson, Hollidaysburg, PA
Mayor Betty Esper, Homestead, PA
Mayor Tim McGuire, Homewood Borough, PA
Mayor Bradley Miller, Hummelstown, PA
Mayor Dee Dee Brown, Huntingdon Borough, PA
Mayor John Zanofti, Hyde Park, PA
Mayor George Hood, Indiana, PA
Mayor Nicholas Yanosich, Industry, PA
Mayor Gerald Croushore, Ingram, PA
Mayor James Sanders, Jefferson, PA
Mayor Ed Foley, Jenkintown, PA

Mayor Donald Bosh, Knoxville, PA
Mayor Sandra Green, Kutztown, PA
Mayor Dorothy Yazurlo, Laflin, PA
Mayor Joseph Legnasky, Lake City, PA
Mayor Rick Gray, Lancaster, PA
Mayor Christopher Blaydon, Langhorne, PA
Mayor Jayne Young, Lansdowne, PA
Mayor Fred Feltenberger, Laureldale, PA
Mayor Peter Poninsky, Leetsdale, PA
Mayor Donald Rehrig, Lehighton, PA
Mayor Albert Montecalvo, Lewis Run, PA
Mayor Nick Vay, Lincoln, PA
Mayor John Mark, Liverpool, PA
Mayor William Hart, Lykens, PA
Mayor Randy Schlegel, Lyons, PA
Mayor Thomas Bell, Mahaffey, PA
Mayor Gerard McGlone, Malvern, PA
Mayor David Sturgess, Manor, PA
Mayor Alexander Chelik, Mayfield, PA
Mayor Terry Bennett, McDonald, PA
Mayor Weslee Clapper-Krepps, McKean, PA
Mayor John Soff, Meadville, PA
Mayor Bob McMahon, Media, PA
Mayor James Zeger, Mercersburg, PA
Mayor Ethel Kellerman, Milesburg, PA
Mayor Thomas Kramer, Millbourne, PA
Mayor James Dorman, Millmont, PA
Mayor John Antoline, Monaca, PA
Mayor Mary Jo Smith, Monessen, PA
Mayor James Segilia, Moosic, PA
Mayor Maureen Piselli, Morton, PA
Mayor Raymond Bodnar, Munhall, PA
Mayor Stephen Szymusiak, Nanty-Glo, PA
Mayor Tom Grady, Narberth, PA
Mayor Anthony Mastrangelo, New Castle, PA

Mayor Joseph Taylor, New Milford, PA
Mayor Frances Tkach, New Philadelphia, PA
Mayor Nicholas DeSantis, New Stanton, PA
Mayor Mary Hetrick, Newport, PA
Mayor Lee Hall, North Charleroi, PA
Mayor Thomas Reenock, Northampton, PA
Mayor Carol Jarvis, Northern Cambria, PA
Mayor George McCloskey, Norwood, PA
Mayor Barbara Crudo, Oil City, PA
Mayor Michele Avvisato, Old Forge, PA
Mayor Austin Scandiber, Orwigsburg, PA
Mayor Lewis Cowher, Osceola Mills, PA
Mayor Geoffrey Henry, Oxford, PA
Mayor Fred Carpenter, Palmyra, PA
Mayor William McCall, Parker, PA
Mayor Ardele Gordon, Parkside, PA
Mayor Robert Winkler, Penndel, PA
Mayor Timothy Smith, Perryopolis, PA
Mayor Michael Nutter, Philadelphia, PA
Mayor Leo Scoda, Phoenixville, PA
Mayor Kimberly Brown-Zerbe, Pine Grove, PA
Mayor Luke Ravenstahl, Pittsburgh, PA
Mayor Bonnie Heath, Pottstown, PA
Mayor John Reiley, Pottsville, PA
Mayor Vaughn Spencer, Reading, PA
Mayor Dr. Guillermo Udarbe, Ridgway, PA
Mayor Desiree DeNicola, Roseto, PA
Mayor Ronald Wagner, Saltsburg, PA
Mayor Edwin Rosenberry, Saxton, PA
Mayor Thomas Hufnagle, Sellersville, PA
Mayor Anthony Hajjar, Seward, PA
Mayor Robert O'Neill, Sharon Hill, PA
Mayor Richard Panza, Sharpsburg, PA
Mayor Bruce Hockersmith, Shippensburg, PA
Mayor Boyd Paul, Snow Shoe, PA

Mayor William Meyer, Somerset, PA
Mayor John Reynolds, Souderton, PA
Mayor James Kennedy, South Coatesville, PA
Mayor Michael Fritz, St. Lawrence, PA
Mayor Elizabeth Goreham, State College, PA
Mayor Thomas Acri, Steelton, PA
Mayor William Boyd, Stoystown, PA
Mayor Harold Davis, Strattenville, PA
Mayor William Davis, Sugar Notch, PA
Mayor Eric Miller, Summerhill, PA
Mayor Paul McArdle, Summit Hill, PA
Mayor David Persing, Sunbury, PA
Mayor Alaina Breakiron, Sutersville, PA
Mayor Richard Lowe, Swarthmore, PA
Mayor Luke Duignam, Tatamy, PA
Mayor Jay Stover, Telford, PA
Mayor Charles Harper, Three Springs, PA
Mayor Kenneth Danser, Timblin, PA
Mayor Reynold Peduzzi, Trafford, PA
Mayor Francis Zalewski, Trainer, PA
Mayor Roger D. Adams, Tremont, PA
Mayor J. David Cutchineal, Tullytown, PA
Mayor LeAnn Hritz, Tunnelhill, PA
Mayor Adam Forgie, Turtle Creek, PA
Mayor Thomas Micozzie, Upper Darby, PA
Mayor David Ricupero, Verona, PA
Mayor Jeffrey Steffler, Wampum, PA
Mayor Esther Cotner, Washingtonville, PA
Mayor Richard Starliper, Waynesboro, PA
Mayor Carolyn Comitta, West Chester, PA
Mayor Joseph Pignoli, West Conshohocken, PA
Mayor Gerald Gross, West Easton, PA
Mayor Ralph Harrington, West Elizabeth, PA
Mayor Frank Schmidt, West Hazleton, PA
Mayor John Dindak, West Homestead, PA

Mayor Mary Popovich, West Newton, PA
Mayor John Henry, West View, PA
Mayor Dick Vargeson, Westfield, PA
Mayor James Nowalk, Whitehall Borough, PA
Mayor Edward Hozza, Whitehall Township, PA
Mayor Thomas Leighton, Wilkes-Barre, PA
Mayor John Thompson, Wilkinsburg, PA
Mayor David Perusso, Wilson, PA
Mayor Larry Markel, Windsor, PA
Mayor Vincent Tozzi, Yatesville, PA
Mayor Dolores Jones-Butler, Yeadon, PA
Mayor John Sanford, Yoe, PA
Mayor C. Kim Bracey, York, PA
Mayor Jeffrey Shull, York Springs, PA
Mayor Joan Derco, Youngwood, PA
Mayor James Diossa, Central Falls, RI
Mayor Charles Lombardi, North Providence, RI
Mayor Donald Grebien, Pawtucket, RI
Mayor Angel Taveras, Providence, RI
Mayor Scott Avedisian, Warwick, RI
Mayor Joseph Riley, Charleston, SC
Mayor John Rhodes, Myrtle Beach, SC
Mayor Joseph McElveen, Sumter, SC
Mayor Darrick Jackson, Timmonsville, SC
Mayor Thomas Taylor, Maryville, TN
Mayor A. C. Wharton, Memphis, TN
Mayor Tom Beehan, Oak Ridge, TN
Mayor Bill Lusk, Signal Mountain, TN
Mayor Lee Leffingwell, Austin, TX
Mayor Tony Martinez, Brownsville, TX
Mayor Bruce Smiley-Kaliff, Castle Hills, TX
Mayor Carl Sherman, DeSoto, TX
Mayor Richard Ward, Hurst, TX
Mayor Dave Claunch, West Lake Hills, TX
Mayor Dana Williams, Park City, UT

Mayor William Euille, Alexandria, VA
Mayor Faye Prichard, Ashland, VA
Mayor Ron Rordam, Blacksburg, VA
Mayor Satyendra Huja, Charlottesville, VA
Mayor McKinley Price, Newport News, VA
Mayor Paul Fraim, Norfolk, VA
Mayor Brian Moore, Petersburg, VA
Mayor Robert Lazaro, Purcellville, VA
Mayor Dwight Jones, Richmond, VA
Mayor David Bowers, Roanoke, VA
Mayor William Sessoms, Virginia Beach, VA
Mayor Walter Mason, Waverly, VA
Mayor Thom Lauzon, Barre, VT
Mayor Miro Weinberger, Burlington, VT
Mayor John Hollar, Montpelier, VT
Mayor Christopher Louras, Rutland City, VT
Mayor Kelli Linville, Bellingham, WA
Mayor H. Clarence Bauman, Chewelah, WA
Mayor Garland Walton, Connell, WA
Mayor Ava Frisinger, Issaquah, WA
Mayor Ron Poulson, Kalama, WA
Mayor Frederick McCarthy, Langley, WA
Mayor Bruce Bassett, Mercer Island, WA
Mayor David Ferguson, Mesa, WA
Mayor Daniel Mork, Millwood, WA
Mayor James Gerwig, Morton, WA
Mayor Dennis Palmer, Oakesdale, WA
Mayor Cheryl Temple, Orting, WA
Mayor Spencer Nichols, Pe Ell, WA
Mayor Paul Warden, Prosser, WA
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AMICUS
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BRIEFS

Supreme Court, U.S.
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No. 12-1371

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,
v.
JAMES ALVIN CASTLEMAN,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers ("NACDL"), a non-profit corporation, works to advance the mission of the criminal defense bar to ensure justice and due process for persons accused of crime or wrongdoing.[1] A professional bar association founded in 1958, NACDL's approximately 10,000 direct members in 28 countries—and 90 state, provincial, and local affiliate organizations totaling up to 40,000 attorneys—include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges committed to preserving fairness and promoting a rational and humane criminal justice system. The American Bar Association recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates.

NACDL has frequently appeared as *amicus curiae* before the United States Supreme Court, the federal courts of appeals, and the highest courts of numerous states. NACDL has a particular interest in the proper interpretation of 18 U.S.C. § 922(g), as an overly broad reading of the statute would extend federal jurisdiction over a wide range of state felonies and misdemeanors. In this case, NACDL believes the Solicitor General's reading of § 922(g)(9) is unduly broad and that it cannot be reconciled with the statutory text or the manifest intent of Congress.

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus curiae*, their members, and counsel, made any monetary contribution towards the preparation and submission of this brief. Petitioner United States and Respondent James Alvin Castleman filed blanket consents to the filing of *amicus curiae* briefs, which were docketed on November 20, 2013, and November 19, 2013, respectively.

SUMMARY OF THE ARGUMENT

1. The Solicitor General's argument proves too much, in that it would expand predicate crimes under § 922(g)(9) beyond sensible boundary. Any offensive touching or indirect use of force in a domestic context would count as "domestic violence." Prosecution of such petty misdemeanors under statutes that the Solicitor General would read as predicates is a reality, not a fanciful hypothetical. Extending § 922(g)(9) to such conduct is contrary to the manifest intent of Congress which was to keep guns out of the hands of "violent domestic abusers."

2. Mr. Castleman's understanding of "physical force," by contrast, would leave the statutory scheme intact. It is not so narrow as to render § 922(g)(9) a dead letter. The Solicitor General is only able to make this argument by cherry-picking statutes for his appendices and omitting aggravated versions of statutes that would still be predicate crimes under § 922(g)(9). A significant number of generic versions of misdemeanor statutes in several states will still qualify. Additionally, use of the modified categorical approach may make more state statutes qualify as predicate offenses.

3. The push and pull of the parties' competing statutory constructions demonstrate, at the very least, a grievous ambiguity in the statute. This is especially so when this Court has interpreted the same statutory language in a recent case, albeit for Armed Career Criminal Act purposes, to exclude the very types of petty offenses that the Solicitor General would treat as qualifying predicates here. The Court should avoid creating even further ambiguity by adopting the So-

licitor General's suggested interpretation. The rule of lenity must be applied and Mr. Castleman's reading adopted. The severity of the prohibition here, a lifelong ban on gun possession, strengthens the case for applying the rule in favor of Mr. Castleman, as do the historical justifications for a rule of lenity.

ARGUMENT

I. THE SOLICITOR GENERAL'S EXPANSIVE READING CANNOT BE SQUARED WITH THE MANIFEST INTENT OF CONGRESS

The Solicitor General's reading of 18 U.S.C. § 922(g)(9) is so broad that it would extend a life-long ban on gun possession to anyone convicted of a domestic count of offensive touching, no matter how slight, U.S. Br. 33, or of any intentional act that causes bodily injury (including minor scrapes, bruises, or even a stubbed toe). U.S. Br. 29. This reading cannot be squared with the words Congress used: defining a "misdemeanor crime of domestic *violence*" as requiring as an element the "use or attempted use of *physical force*." 18 U.S.C. § 921(a)(33)(A) (emphasis added). Such an expansive reading is contrary to the manifest intent of Congress to strip away gun rights only from those who have committed "violent domestic abuse." Mr. Castleman's reading of the statute, as requiring violent force, adheres to the intent of Congress and gives a consistent meaning to the term "physical force" as it is used in § 922(g). See *Johnson* v. *United States*, 559 U.S. 133, 140 (2010) (defining "physical force" as it relates to the application of § 922(g)(1) as meaning "violent force").

The Solicitor General concedes that his interpretation could be read very expansively, but attempts to dismiss the possibility of the prosecution of minor conduct as "fanciful hypotheticals." U.S. Br. 25. Merely stating that individuals are not "prosecuted . . . for causing a paper cut or stubbed toe," U.S. Br. 27, is both conclusory and cavalier.

Minor conduct is routinely punished under the Tennessee statute at issue. In *State* v. *Wachtel*, for example, the court upheld a count of assault when the defendant had "tried to slap his hands at [his mother's] arms to keep them away from him [and t]he slaps caused some scratches and bruises." No. M2003-00505-CCA-R3-CD, 2004 WL 784865, at *12 (Tenn. Crim. App. Apr. 13, 2004) (internal quotation marks omitted). Mr. Castleman points to other minor violations of the Tennessee domestic violence statute cited in criminal complaints. Br. Resp't 32. The reality is that courts applying a broad definition of physical force do regularly find convictions for such minor conduct to be predicate offenses under § 922(g)(9). In *United States* v. *Wells*, for example, the defendant had "physically restrained his wife, allegedly to prevent her from assaulting him or leaving the family residence in an intoxicated state." 826 F. Supp. 2d 441, 442-43 (N.D.N.Y. 2011). Wells pled guilty to the misdemeanor of unlawful imprisonment, which the court found to be a predicate offense under § 922(g)(9). *Id.* at 442. Likewise, in *Koll* v. *Dep't of Justice*, the court held that the defendant's disorderly conduct conviction was a sufficient predicate offense under § 922(g)(9). 769 N.W.2d 69 (Wis. Ct. App. 2009). The conduct in *Koll* involved the defendant "slapp[ing] the hand and twist[ing] the arm of his live-in girlfriend." *Id.* at 70.

Wells and *Koll* demonstrate that it is not just statutes that have a domestic relationship as a definitional element that are affected by a broad reading of § 922(g)(9). Any misdemeanor can qualify as a predicate crime under § 922(g)(9) as long as the misdemeanor "has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon" and the existence of a domestic relationship is proved to the jury beyond a reasonable doubt. *United States* v. *Hayes*, 555 U.S. 415, 425 (2009) (quoting 18 U.S.C. § 921(a)(33)(A)). The misdemeanors of disorderly conduct, unlawful imprisonment, menacing, disturbing the peace, and harassment have all been found to be sufficient predicate offenses under § 922(g)(9). See, *e.g.*, *Koll*, 769 N.W.2d at 70 (disorderly conduct conviction); *United States* v. *Medicine Eagle*, 266 F. Supp. 2d 1039 (D.S.D. 2003) (same); *Wells*, 826 F. Supp. 2d at 442 (a guilty plea of unlawful imprisonment); *United States* v. *Kavoukian*, 315 F.3d 139 (2d Cir. 2002) (conviction for menacing in the second degree); *King* v. *Wyo. Div. of Criminal Investigation*, 89 P.3d 341 (Wyo. 2004) (a guilty plea for disturbing the peace); *United States* v. *Marshall*, No. 2:08-CR-49-MEF, 2009 WL 691928 (M.D. Ala. Mar. 11, 2009) (conviction for harassment). This combination of *Hayes* and the Solicitor General's expansive interpretation of § 922(g)(9) would extend federal jurisdiction to all manner of minor misdemeanors.[2]

The Solicitor General would also have this Court give "physical force" such a broad meaning as to include even offensive touching. U.S. Br. 33. Offensive touching covers some truly trivial conduct. In *United States* v. *Lewellyn*, for example, the Ninth Circuit held that "spitting on another person is an offensive touching that rises to the level of simple assault under the theory of assault as an attempted or completed battery." 481 F.3d 695, 699 (9th Cir. 2007); see also *United States* v. *Masel*, 563 F.2d 322, 324 (7th Cir. 1977) (stating that "[i]t is ancient doctrine that intentional spitting upon another person is battery" in upholding the conviction of the defendant for spitting on a U.S. Senator as a gesture of disapproval); *Commonwealth* v. *Cohen*, 771 N.E.2d 176 (Mass. App. Ct. 2002) (upholding a conviction for assault and battery when the defendant intentionally spat on a young woman with whom he had a disagreement); *State* v. *Helou*, 822 So.2d 647, 653 (La. Ct. App. 2002) ("spitting on another constitutes a battery"), *vacated*, 857 So.2d 1024 (La. 2003). Professor LaFave confirms the low threshold for offensive touching: "But, in addition to . . . more obvious bodily injuries, offensive touchings (as where a man puts his hands upon a girl's body or kisses a woman against her will, or where one person spits into another's face) will also suffice for battery under the traditional view." 2 Wayne R. LaFave, *Substantive Criminal Law* § 16.2, at 553 (2d ed. 2003).

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[2] The continuing validity of *Hayes* after *Descamps* v. *United States*, is unclear, as is the ability of these various misdemeanors to qualify as predicate offenses under the categorical approach as clarified by *Descamps*. 133 S. Ct. 2276 (2013). The broader the definition given to the element of "physical force," however, the more likely it is that these kinds of minor misdemeanors would continue to qualify as predicate offenses.

Mr. Castleman's proper reading of the statute to require "violent force" rather than any form of physical force, is required to prevent the application of a stiff penalty—up to ten years in prison—and a stiff prohibition—a life-long ban on gun possession—to physical, but not serious conduct, such as grabbing a person's wrist or arm, *United States* v. *Smith*, 812 F.2d 161, 164 (4th Cir. 1987), or pushing someone to break free of their grip, *United States* v. *Patch*, 114 F.3d 131, 133 (9th Cir. 1997). Such a reading is in accord with the intent of Congress in passing the Lautenberg Amendment. The sponsor emphasized that the amendment was needed because "many people who engage in *serious* spousal or child abuse ultimately are not charged with or convicted with felonies." 142 Cong. Rec. 19,415 (1996) (statement of Sen. Lautenberg) (emphasis added). Congress was concerned not about minor conduct, but about violent individuals possessing firearms. *Id.* ("This amendment closes this dangerous loophole and keeps guns away from *violent* individuals . . . ") (emphasis added); 142 Cong. Rec. 26,674 (1996) (statement of Sen. Lautenberg) ("Once he *beat his wife brutally* and was prosecuted, but like most wife beaters, he pleaded down to a misdemeanor . . . .") (emphasis added); 142 Cong. Rec. 19,415 (1996) (statement of Sen. Lautenberg) ("In simple words, the amendment says that *wife beaters and child abusers* should not have guns.") (emphasis added); see also Br. Resp't 22-23.

II. MR. CASTLEMAN'S READING DOES NOT TURN § 922(G)(9) INTO A DEAD LETTER

The dire picture that the Solicitor General paints about the applicability of § 922(g)(9) is inaccurate. The Solicitor General selectively provides statutes to support his claim and omits aggravated misdemeanors that would trigger liability under § 922(g)(9). U.S. Br. 21a-29a. For example, the Solicitor General cites New Mexico Statute Annotated § 30-3-15(A) which provides: "Battery against a household member consists of the unlawful, intentional touching or application of force to the person of a household member, when done in a rude, insolent or angry manner." (West 2013). What the Solicitor General failed to point out, however, is a more serious domestic violence provision in N.M. Stat. Ann. § 30-3-16:

> A. Aggravated battery against a household member consists of the unlawful touching or application of force to the person of a household

> member with intent to injure that person or another.
>
> B. Whoever commits aggravated battery against a household member by inflicting an injury to that person that is not likely to cause death or great bodily harm, but that does cause painful temporary disfigurement or temporary loss or impairment of the functions of any member or organ of the body, is guilty of a misdemeanor.

(West 2013). Given that violent force is likely necessary to effect the harms prohibited by § 30-3-16, it would likely qualify as a predicate offense.

In other jurisdictions, convictions under statutes proscribing specific conduct of the sort that prompted Congress to enact the Lautenberg Amendment would likely qualify as predicate offenses. In New York, for example, N.Y. Penal Law § 121.11 provides: "A person is guilty of criminal obstruction of breathing or blood circulation when, with intent to impede the normal breathing or circulation of the blood of another person, he or she: [] applies pressure on the throat or neck of such person; or [] blocks the nose or mouth of such person. Criminal obstruction of breathing or blood circulation is a class A misdemeanor." (McKinney 2013). Finally, Oregon Revised Statute Annotated § 163.187(1) provides: "A person commits the crime of strangulation if the person knowingly impedes the normal breathing or circulation of the blood of another person by: (a) Applying pressure on the throat or neck of the other person; or (b) Blocking the nose or mouth of the other person." (West 2013). "Strangulation is a Class A misdemeanor." *Id.* § 163.187(3). Such statutes barring specific conduct would clearly qualify as predicate acts under § 922(g)(9) if a domestic relationship were proved.

In other states, assault and battery statutes could qualify as predicate offenses under § 922(g)(9). For example, in Utah, "[a]ssault is . . . an act, committed with unlawful force or violence, that causes bodily injury to another or creates a substantial risk of bodily injury to another." Utah Code Ann. § 76-5-102(1)(c) (West 2013). Domestic violence is defined as an assault under § 76-5-102 "by one cohabitant against another." Utah Code Ann. § 77-36-1(4)(b) (West 2013). In California, "[a] battery is any willful and unlawful use of force or violence upon the person of another." Cal. Penal Code § 242 (West 2013). "When a battery is committed against any person and serious bodily injury is inflicted on the person, the battery is punishable by imprisonment in a county jail not exceeding one year . . . ." *Id.* § 243(d). Finally, as Mr. Castleman notes, even under the modified categorical approach, as recently clarified in *Descamps*, there are likely statutes from other states that will continue to qualify as predicate offenses. There is no need to expand federal jurisdiction by making every conviction for "rude touching" or the like a predicate offense in order to honor Congress's intent with respect to § 922(g)(9).

III. THE RULE OF LENITY SUPPORTS ADOPTING MR. CASTLEMAN'S READING OF § 922(G)(9)

1. This case presents two readings of the statute: one that potentially sweeps in many different kinds of misdemeanors and all manor of minor conduct, and another that follows the intent of Congress by only covering violent domestic abusers. The text, context, structure, and purpose of § 922(g)(9), not to mention this Court's authoritative construction of near-identical language in § 924(e)(2)(B)(i), all conclusively point in the same direction: a misdemeanor crime of

domestic violence requires *violent* force. Mere unwelcome touching or indirect applications of force do not trigger the severe penalties under § 922(g)(9).

After applying all of the tools of construction, it is clear that Mr. Castleman's reading of the statute is correct. The plain meaning of "physical force" is contrary to the Solicitor General's broad definition as Mr. Castleman persuasively shows. Br. Resp't 13-18. The structure of § 922(g) also supports Mr. Castleman's reading. This Court has interpreted "physical force" as used in § 924(e)(2)(B)(i) to mean "violent force" in *Johnson*. 559 U.S. at 140. *Johnson* dealt with application of § 922(g) to an underlying state conviction just as this case does. The same definition of "physical force" should therefore apply to the application of § 922(g)(9) as it did to § 922(g)(1). The legislative history also confirms Mr. Castleman's reading. Congress was concerned with violent domestic abusers possessing firearms. See *supra* pg. 7. The Solicitor General's arguments cannot surmount this evidence of the meaning of "physical force."

The Solicitor General posits that "physical force" means "*violent* force" when prosecuted as a violent felony but not when prosecuted as misdemeanor domestic violence because unwelcome touching would be a "comical misfit" with a felony infraction as opposed to a misdemeanor. U.S. Br. 16 (quoting *Johnson*, 559 U.S. at 145). But the *Johnson* Court noted that this misfit was occasioned by the word "violent," which connotes "strong physical force," 559 U.S. at 140-41, and that very word appears in the operative provision in this case. The difference between a felony and a misdemeanor *might* obviate the otherwise striking similarities between the two provisions—but that gets the Solicitor General only to grievous ambiguity, not to certainty.

The very most that the Solicitor General's argument can establish is grievous ambiguity in the statute. There is no way to tell if Congress used the same language to mean entirely different things in the same statute—and Mr. Castleman must still prevail. *Hughey* v. *United States*, 495 U.S. 411, 422 (1990) (holding that when a criminal statute is ambiguous, the rule of lenity breaks the tie in favor of the defendant); see also ***Maracich*** v. ***Spears***, 133 S. Ct. 2191, 2209 (2013) ("'the rule of lenity only applies if, after considering text, structure, history, and purpose, there remains a grievous ambiguity or uncertainty in the statute such that the Court must simply guess as to what Congress intended.'" (quoting *Barber* v. *Thomas*, 130 S. Ct. 2499, 2508 (2010))). To hold for the Solicitor General here would require this Court to guess as to Congressional intent. It would require this Court to guess that Congress meant "physical force" to mean two different things in the same statute, and to guess that Congress meant unwelcome touching when it said "domestic violence."

2. The rule of lenity applies with particular urgency in cases like this one that impinge on the constitutional right outlined in *District of Columbia* v. *Heller*, 554 U.S. 570, 595 (2008). As this Court has explained, the rule "resolve[s] doubts in the enforcement of a penal code against the imposition of a harsher punishment." *Bell* v. *United States*, 349 U.S. 81, 83 (1955). Section 922(g)(9) imposes a very harsh condition on those convicted of a predicate offense: a life-long ban on gun possession. Determining which offenses will qualify for such a strong prohibition calls for application of the rule of lenity. The rule, which Chief Justice Marshall described as "perhaps not much less old than construction itself," *United States* v. *Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820),

safeguards three pillars of the criminal justice system: fair notice for the accused, consistent enforcement of the law, and the separation of powers. See *United States* v. *Kozminski*, 487 U.S. 931, 952 (1988). This case implicates all three principles.

It is a fundamental tenet of Anglo-American jurisprudence that the law must provide "'fair warning . . . of what [it] intends to do if a certain line is passed.'" *United States* v. *Bass*, 404 U.S. 336, 348 (1971) (quoting *McBoyle* v. *United States*, 283 U.S. 25, 27 (1931)). Courts have thus long recognized that "[i]t is not consistent with the just and benign spirit of our law to give to a criminal statute an interpretation which can be maintained only by a keen and scholastic ingenuity. The meaning of the law which consigns a man to prison, or deprives him of his property should be plain and obvious, and easily understood by an ordinary capacity." *James* v. *State*, 63 Md. 242, 253 (1885). The rule's insistence on fair notice "vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subject to punishment that is not clearly prescribed." *United States* v. *Santos*, 553 U.S. 507, 514 (2008) (plurality opinion). But a person of ordinary capacity would strain to understand why "physical force" means "*violent* force" when it defines a violent felony, but expands to include all unwelcome touching when it defines a "misdemeanor crime of domestic violence." When this Court has defined a statutory term, the public should be able to rely on that definition for fair notice of its meaning in the same statutory context, rather than trawling through the legislative history and pondering the *most* punitive construction that the alleged statutory purpose might sustain, as the Solicitor General would instead require.

So too with uniform application of the criminal laws. The rule serves "to minimize the risk of selective or arbitrary enforcement," *Kozminski*, 487 U.S. at 952, by "fostering uniformity in the interpretation of criminal statutes . . . ." *Bryan* v. *United States*, 524 U.S. 184, 205 (1998) (Scalia, J., dissenting). The application of that principle to this case is obvious: uniform interpretation of statutes starts with giving words consistent meaning. In the absence of compelling reasons to the contrary, the same phrase should mean the same thing throughout the statute. See *Brooke Grp. Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 230 (1993).

Similarly, separation of powers concerns counsel in favor of Mr. Castleman's reading of the statute. The rule of lenity properly allocates the responsibility for creating and delimiting crimes and criminal penalties to Congress, and keeps courts out of the business of expanding criminal liability beyond the plain text of criminal statutes. The rule "places the weight of inertia upon the party that can best induce Congress to speak more clearly and keeps courts from making criminal law in Congress's stead." *Santos*, 553 U.S. at 514. The Solicitor General's extensive policy arguments in favor of a broad construction of the statute here, see U.S. Br. 35-47, are thus misdirected: Congress might deem it wise to adopt a new definition of "physical force" to cover misdemeanors that do not involve violent force, but that is no reason for this Court to cast aside its settled statutory construction.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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IN THE

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UNITED STATES OF AMERICA,
Petitioner,
v.
JAMES ALVIN CASTLEMAN,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF *AMICI CURIAE* OF THE NATIONAL NETWORK TO END DOMESTIC VIOLENCE, THE NATIONAL DOMESTIC VIOLENCE HOTLINE, THE DOMESTIC VIOLENCE LEGAL EMPOWERMENT AND APPEALS PROJECT (DV LEAP), LEGAL MOMENTUM

(Additional *Amici* Continued On First Page)

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INTEREST OF *AMICI CURIAE* [1]

Amici include numerous non-profit organizations devoted to remedying domestic violence through legal, legislative, and policy initiatives, as well as organizations providing advocacy and legal and counseling services to survivors of domestic violence. *Amici* collectively have hundreds of years of experience working with survivors of domestic violence, including undertaking extensive efforts to improve the justice system's response to victims of domestic violence.

Amici are deeply concerned that the Sixth Circuit's interpretation of the Lautenberg Amendment will limit the classes of misdemeanants subject to the federal prohibition on firearm possession in contravention of Congress's intent and the context in which Congress framed the prohibition, as well as the resulting impact on victims of domestic violence. For these reasons, therefore, *Amici* are submitting this brief in support of the Petitioner.[2]

SUMMARY OF THE ARGUMENT

The Lautenberg Amendment, 18 U.S.C. § 922(g)(9), prohibits gun possession by anybody who has been convicted of a "misdemeanor crime of domestic violence," and defines that term to include any offense that has, as an element, the use or attempted use of "physical force." As this Court has previously explained, the meaning of "physical force" is dependent on context. The context of the Lautenberg Amendment is inconsistent with the Fourth, Sixth, Ninth and Tenth Circuit's restrictive interpretations, which effectively read the words "violent" or "strong" into the statute.

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[1] Pursuant to Sup. Ct. R. 37.6, *Amici Curiae* state that no counsel representing a party authored this brief in whole or in part, and no person or entity other than the *Amici Curiae* or their counsel made a monetary contribution to the preparation or submission of this brief.

[2] Pursuant to Sup. Ct. R. 37.3(a), counsel of record for both Petitioner and Respondent have consented to the filing of this brief through the blanket consents that each has lodged with the Clerk. The identities and interest of *Amici* are described in the Appendix to this brief.

The context of the statute is, rather, consistent with the position adopted by the First, Eighth and Eleventh Circuits, which hold that the Lautenberg Amendment applies to convictions under state laws proscribing battery committed through any kind of "physical force," including "offensive contact" or the infliction of "bodily injury." First, the statute applies to defendants convicted of "misdemeanor" crimes, and as this Court has previously determined, the common law gives a specialized legal usage to the word "force" as an element of misdemeanor battery, holding this element to be satisfied by even the slightest offensive touching.

Second, the Lautenberg Amendment applies to defendants convicted of crimes of "domestic violence," which is a broad term of art. It denotes a spectrum of abusive behavior committed by intimate partners for purposes of coercion and control. Such abuses frequently include the use of "force" at levels criminalized by typical misdemeanor battery statutes. An interpretation of the Lautenberg Amendment that excludes these common acts of domestic violence is therefore at odds with the plain meaning of the statutory language. It is also inconsistent with Congress's purpose to keep guns out of the hands of abusers who are likely to escalate their violent behavior.

ARGUMENT

I. "Domestic Violence" Is A Broad Phenomenon Consisting Of A History And Pattern Of Abuse That Is Not Limited To Single Acts Of "Strong" Or "Violent" Physical Force.

18 U.S.C. § 922(g)(9) prohibits the possession of firearms by anybody who has been convicted of a misdemeanor crime of "domestic violence." The operative phrase is a term of art that denotes a broad social phenomenon. Thus, the inclusion of the phrase "domestic violence" in the Lautenberg Amendment frames the firearm possession ban within the specific social problem Congress intended to combat and provides the essential context for interpreting related language, including the phrase "physical force" under 18 U.S.C. § 921(a)(33)(A)(ii).[3]

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[3] When interpreting statutory language, "[u]ltimately, context determines meaning." *Johnson v. United States*, 559 U.S. 133, 139 (2010). This principle applies even when interpreting the same word in the same or a related statute. *See Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932) ("[The] presumption that identical words used in different parts of the same act are intended to have the same meaning . . . is not rigid and readily yields whenever there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent."); *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 594-97 (2004) (depending on context, term "age" in Age Discrimination in Employment Act carries different meanings); *Robinson v. Shell Oil Co.*, 519 U.S. 337, 343-44 (1997) (depending on context, term "employees" in Title VII of Civil Rights Act carries different meanings).

A. "Domestic violence" involves a spectrum of behaviors – including but not limited to physical force – intended to exert power and control over an intimate partner.

"Domestic violence" does not necessarily involve "strong and violent physical force,"[4] although it can and all-too-frequently does. Rather, as the phrase is widely and commonly used in both the United States and other countries, "domestic violence" denotes a spectrum of behaviors committed by spouses and other intimate partners.[5] It is distinguished from generic "violence" not so much by the *nature* of the abusive conduct as by its *purpose*: at bottom, "domestic violence is about gaining control of another person."[6]

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[4] *United States v. Castleman*, 695 F.3d 582, 588 (6th Cir. 2012); *cf. Johnson*, 559 U.S. at 140 (in context of statute imposing penalties for predicate "violent felon[ies]," interpreting phrase "physical force" to mean "*violent* force—that is, force capable of causing physical pain or injury to another person" (emphasis in original)).

[5] While domestic violence also plagues the elderly and children, this brief focuses on intimate partner violence. Relatedly, while women may perpetrate domestic violence, and violence also occurs in same-sex relationships, the vast majority of victims are women and their attackers are men. *See, e.g.*, Shannan Catalano, Bureau of Justice Stats., U.S. Dep't of Justice, *Special Report: Intimate Partner Violence, 1993-2010,* NCJ 239203 at 1 (Nov. 2012) (approximately four in five victims of domestic violence are female). Accordingly, this brief describes domestic violence in terms of female victims and male attackers.

[6] Alafair S. Burke, *Domestic Violence as a Crime of Pattern and Intent: An Alternative Reconceptualization*, 75 Geo. Wash. L. Rev. 552, 569 (2007); *see* Evan Stark, *Coercive Control* 5 (2007) (hereinafter, "Stark, *Coercive Control*") (articulating "coercive control" theory of domestic violence, which frames "woman battering . . . as a course of calculated, malevolent conduct

Domestic violence is an "ongoing strategy of intimidation, isolation, and control that extends to all areas of a woman's life, including sexuality; material necessities; relations with families, children, and friends; and work."[7]

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deployed almost exclusively by men to dominate individual women by interweaving repeated physical abuse with three equally important tactics: intimidation, isolation, and control").

[7] Evan Stark, *Re-Presenting Woman Battering: From Battered Woman's Syndrome to Coercive Control*, 58 Alb. L. Rev. 973, 986 (1995); *see also Domestic Violence*, U.S. Dep't of Justice, Office on Violence Against Women, http://www.ovw.usdoj.gov/domviolence.htm (last visited Nov. 18, 2013) (hereinafter, "USDOJ Office on Violence Against Women") (defining "domestic violence" as "a pattern of abusive behavior in any relationship that is used by one partner to gain or maintain power and control over another intimate partner"); Home Office (U.K.) and AVA, *Information for Local Areas on the Change to the Definition of Domestic Violence and Abuse* 2 (March 2013), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/142701/guide-on-definition-of-dv.pdf (hereinafter, "U.K. Home Office") (defining "domestic violence and abuse" as "[a]ny incident or pattern of incidents of controlling, coercive or threatening behavior, violence or abuse" against intimate partners or family members); U.N. Children's Fund, *Domestic Violence Against Women And Girls*, Innocenti Digest, June 2000, at 7, *available at* http://www.unicef-irc.org/publications/pdf/digest6e.pdf (hereinafter, "UNICEF") (identifying causes of "domestic violence" as "socioeconomic forces, the family institution where power relations are enforced, fear and control over female sexuality, belief in the inherent superiority of males, and legislation and cultural sanctions that have traditionally denied women and children an independent legal and social status").

The meaning of "domestic violence" is necessarily broad, then, because the words describe a broad reality.[8] Over time, and according to the circumstances, the domestic violence inflicted by a particular abuser on a particular victim may include a wide variety of acts, all calculated to exert power and gain (or maintain) control over the victim.[9] "Domestic violence is about power and control. It is not just about hitting or punching."[10] It can be "strongly" physical, but it may also include weaker forms of physical force and contact, or even non-physical behaviors—indeed, it may encompass any "physical, sexual, emotional, economic, or psychological actions or threats of actions that influence another person. This includes any behaviors that intimidate, manipulate, humiliate, isolate, frighten, terrorize, coerce, threaten, blame, hurt, injure or wound someone."[11,12] Accordingly, as between any given abuser and his victim, the reality

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[8] This reality is both broad and pervasive. Each year, approximately 1.5 million women are raped and/or physically assaulted by a current or former intimate partner in the United States. Patricia Tjaden and Nancy Thoennes, U.S. Dep't of Justice, *Extent, Nature, and Consequences of Intimate Partner Violence: Findings from the National Violence Against Women Survey* iii (July 2000). Approximately 22.1% of women report having been physically assaulted by an intimate partner during their lifetime. *Id.* at 10.

[9] *See* Burke, *supra* note 6, at 570 ("To obtain or maintain control over their intimate partners, batterers do not limit themselves to physical abuse.").

[10] *Domestic Violence*, Tenn. District Attorney's Gen. Conf., http://www.tndagc.org/dv.htm (last visited Nov. 18, 2013).

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[11] USDOJ Office on Violence Against Women, *supra* note 7; *see also* U.K. Home Office, *supra* note 7, at 2 (stating that "domestic violence and abuse" encompasses psychological, physical, sexual, financial and emotional abuse); UNICEF, *supra* note 7, at 2 (including within definition of "domestic violence" physical abuse, sexual abuse, psychological abuse, economic abuse and acts of omission); Council of Europe, Convention on Preventing and Combating Violence Against Women and Domestic Violence art. 3(b), Nov. 5, 2011, CETS No. 210 (defining "domestic violence" to mean "all acts of physical, sexual, psychological or economic violence that occur within the family domestic unit or between former or current spouses or partners"). This understanding of "domestic violence" is widely accepted; for example, state domestic violence statutes often define the term to include activities not marked by physical violence, such as burglary, trespass, harassment and stalking, when directed against the victim of abuse. *See, e.g.*, Del. Code Ann., tit. 10, § 1041; 750 Ill. Comp. Stat. 60/103; Ind. Code Ann. § 35-31.5-2-76; N.J. Stat. Ann. § 2C:25-19; R.I. Gen. Laws § 12-29-2; Utah Code Ann. § 77-36-1; Wash. Rev. Code § 10.99.020. And, some explicitly define the term with reference to its underlying coercive dynamic. *See, e.g.*, Colo. Rev. Stat. § 18-6-800.3.

[12] A vivid illustration of the roots of domestic violence and the variety of abuse it involves can be found in a widely used instrument that visually represents the "pattern of actions that an individual uses to intentionally control or dominate his intimate partner." Domestic Abuse Intervention Programs, *Wheel Gallery*, Home of the Duluth Model, http://www.theduluthmodel.org/training/wheels.html (last visited Nov. 18, 2013). On the so-called "Power and Control Wheel," the words "power and control" appear in the center of a wheel, with the behaviors commonly employed to exert such power and control—intimidation, emotional abuse, isolation, denying and blaming, children, male privilege, economic abuse, and coercion and threats—representing the spokes. *Id.* The words "physical and sexual violence" are written around the perimeter, "hold[ing] it all together" as the rim. *Id.*

of "domestic violence" may include such conduct as ridicule and name-calling; excessive monitoring of a woman's behavior, repeated accusations of infidelity, and controlling with whom she has contact; verbal threats directed at the woman herself or at her family, children or friends; stalking behaviors; spitting, scratching, biting, grabbing, restraining, slapping, punching or kicking; choking; threatening or using a knife or gun; and rape or other forms of sexual coercion.[13]

Thus, while "domestic violence" frequently is marked (or comes to be marked) by a "high degree of physical violence,"[14] it is by no means limited to such behavior. It includes non-physical behavior and, even when it turns physical, it frequently occurs—in a very real and consequential way—without "strong" or "violent" physical force or "serious physical injury." Indeed, studies demonstrate that "most physical assaults committed against women . . . by intimates are relatively minor and consist of pushing, grabbing, shoving, slapping, and hitting."[15] Such "minor" physical contact is nevertheless classic domestic violence: abusive in intent and effect; physically and psychologically damaging; and predictive of continuing and increasing levels of physical force. As one commentator has noted, such acts may seem relatively *de minimis* in the abstract, but assume a special significance in the context of an abusive relationship: "[A]ll slaps, kicks, and other physical acts, are not the same. Some are more frightening than others, especially if accompanied with a certain look on the man's face . . . . Others, are qualitatively different in the type of slap, the length of time the choke hold is held or other differences in an act . . . ."[16] Again, the common denominator of these acts—regardless of their perceived degree of severity—is the underlying intent of the abuser to send a message to the victim that she is under his control.

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[13] *See* Anne L. Ganley, *Understanding Domestic Violence, in Improving the Health Care Response to Domestic Violence: A Resource Manual for Health Care Providers* 14, 18-24 (2d ed. 1996), *available at* http://www.futureswithoutviolence.org/userfiles/file/HealthCare/improving_healthcare_manual_1.pdf (last visited Nov. 18, 2013); *see also* Michele C. Black et al., Nat'l Ctr. for Injury Prevention and Control, Ctrs. for Disease Control and Prevention, *The National Intimate Partner and Sexual Violence Survey: 2010 Summary Report* 37 (Nov. 2011) (measuring broad range of conduct in national survey on prevalence of intimate partner violence).

[14] *See Castleman*, 695 F.3d at 589

[15] Tjaden & Thoennes, *supra* note 8, at 11; *see* Black, *supra* note 13, at 43 and Table 4.8 (reporting that approximately 30.3% of American women have been slapped, pushed or shoved by

B. "Domestic violence" is marked by a pattern of abusive behavior that often escalates in frequency and severity over time.

One hallmark of domestic violence is that it grows out of, and serves to perpetuate, a dynamic of power and control between intimate partners. Another,

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intimate partner in their lifetime and that 24.3% have experienced severe physical violence by intimate partner); Stark, *Coercive Control*, *supra* note 6, at 94-95 (observing that "survey and point of service research indicate that the vast majority of domestic violence is either noninjurious or causes injuries that are minor from a medical or criminal justice standpoint").

[16] Lenore A. Walker, *The Battered Woman's Syndrome* 123 (3d ed. 2007). "In fact, the appearance of abuse as minor is the direct byproduct of applying a definition [of domestic violence] that disaggregates frequent assaults into discrete incidents, measures abuse by incident-specific harms, and ignores the cumulative impact of multiple assaults on individual victims." Stark, *Coercive Control*, *supra* note 6, at 95.

related characteristic is that this underlying dynamic often drives the abusive partner into a series or pattern of escalating behaviors: the first incident of abuse is typically not the last, and when less abusive tactics no longer have the intended effect, they are replaced with more abusive acts.[17] The results of the National Violence Against Women Survey demonstrate that approximately 65.5% of women physically assaulted by an intimate are victimized multiple times by the same partner.[18] Nearly twenty percent of respondents to that survey recalled ten or more incidents of physical assault by the same partner occurring per year, with the average number of assaults per year nearly seven.[19]

Domestic violence, then, cannot and should not be identified by any one discrete incident, as generic "violence" may be viewed; rather, domestic violence is "a variety of abusive acts, occurring in multiple episodes over the course of the relationship," each of which is connected to the others and builds upon them.[20] It is marked by the abuser's use of "a wide range of coercive behaviors that result in a wide range of consequences, some physically injurious and some not," but all aimed at achieving control over the victim.[21] Accordingly, over time, an abuser may change tactics, increasing the use and severity of physical violence or relying on other forms of abuse, to employ "the tactics that are most useful in gaining control."[22] Regardless of the precise contours of abuse, however, the result is cumulative; due to the ongoing and continuous nature of domestic violence, "[o]ne battering episode builds on past episodes and sets the stage for future episodes,"[23] instilling "the fear of future assaults by a known assailant" into the victim.[24] "Even the language used to describe the experience of domestic violence reflects its frequent and prolonged nature. We say that a woman who has been assaulted by her husband is 'battered' or 'beaten,' or has been subjected to 'domestic violence,' suggesting a general status or a continued phenomenon. In contrast, when a person has been assaulted by a stranger or casual acquaintance, we say he has been 'attacked' or 'assaulted,' or has gotten into a 'fight,' suggesting a one-time act of violence, not violence more generally."[25]

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[17] *See, e.g.*, Lisa D. May, *The Backfiring of the Domestic Violence Firearms Ban*, 14 Colum. J. Gender & L. 1, 3 (2005) (noting that "[d]omestic violence is typically characterized 'by a pattern of abusive behavior . . . which escalates in frequency and severity over time'" (citation omitted)); Natalie Loder Clark, *Crime Begins at Home: Let's Stop Punishing Victims and Perpetuating Violence*, 28 Wm. & Mary L. Rev. 263, 291 (1987) ("The first instance of violence . . . is usually short and not terribly severe. . . . Later in the pattern of violence, however, the same victim faces a serious threat to life and health, and may be . . . too afraid to change the situation alone.").

[18] Tjaden & Thoennes, *supra* note 8, at 39.

[19] *Id.* at 39 and Exhibit 11.

[20] Ganley, *supra* note 13, at 18.

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[21] *Id.*

[22] *Id.* at 23.

[23] *Id.* at 18.

[24] *Id.* at 17-18 (noting that "[p]erpetrators refer to past episodes (e.g., 'Remember the last time?') and make threats about future abuse as a way to maintain control"); *see also* Stark, *Coercive Control*, *supra* note 6, at 99-101 (describing continuous and ongoing nature of abuse).

[25] Burke, *supra* note 6, at 568.

Congress was concerned with the extreme—and extremely dangerous—role that firearms play in this pattern when it enacted Section 922(g)(9). The statutory phrase "misdemeanor crime of domestic violence" denotes behavior—e.g., shoves, slaps, physical restraint—that falls squarely on the spectrum of domestic violence: committed for fundamentally violent purposes of coercion and control and carrying with it a significant risk of recurrence and escalation. The Lautenberg Amendment, along with 18 U.S.C. § 922(g)(8), reflects the reality that even "less violent" forms of domestic violence—the kind of "offensive touching" that is commonly prosecuted as a misdemeanor, or even non-physical threats or harassment that may prompt only a civil protection order—will almost certainly repeat and worsen over time; both statutes serve to mitigate the special risk of escalation into lethal violence that exists when the abuser has access to firearms.[26]

C. The likelihood that "domestic violence" will escalate from any point on the spectrum to more extreme levels of physical violence is reliably predicted by the presence of certain risk factors, most notably, the abuser's access to firearms.

Congress acted rationally and in response to a well-documented problem—indeed, a problem of crisis proportions. "The United States has the highest rate of [intimate partner homicide] than any industrialized country," with "approximately 1,200 women . . . killed by their current or former intimate partner during each year of the 21st century."[27] Approximately 70% of female murder victims "were physically abused before their deaths by the same intimate partner who killed them."[28]

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[26] *See* May, *supra* note 17, at 5-6 (reviewing legislative history and concluding that Sections 922(g)(8) and (9) "grew out of the same recognition: domestic violence offenders with access to firearms pose an intolerable danger" and "both serve the same purpose: removing firearms from the hands of those likely to use them in domestic disputes").

Researchers have discovered, moreover, that the risk of lethal escalation is dependent not only on the level of violence that has occurred so far—e.g., whether the abuser has to date engaged in verbal threats or "offensive touching," as opposed to "strong" physical abuse such as punches and kicks—but on whether the circumstances include the presence of other risk factors.[29] Factors known to exacerbate the risk of lethal escalation include drug and alcohol use, unemployment and financial difficulties, mental illness and suicidal tendencies, and whether the victim has a child by another man.[30]

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[27] Jacquelyn C. Campbell et al., *The Danger Assessment: Validation of a Lethality Risk Assessment Instrument for Intimate Partner Femicide*, 24 J. Interpers. Violence, April 2009, at 654-56 (hereinafter, "Campbell, *The Danger Assessment*") (citation omitted) (noting that this number rises to approximately 1,400 to 1,750 when data for femicides committed by former boyfriends is included).

[28] Jacquelyn C. Campbell et al., *Risk Factors for Femicide in Abusive Relationships: Results from a Multisite Case Control Study*, 93 Am. J. of Pub. Health 1089, 1091 (2003) (hereinafter, "Campbell, *Risk Factors*") (interviewing proxies of 220 intimate partner femicide victims identified through police or medical examiner records).

[29] *Id.* at 1090-91 and Table 3.

[30] *Id.* These factors have been compiled under a rubric called the Danger Assessment, created in the 1980s as "a clinical and research instrument . . . designed to assist battered women in assessing their danger of being murdered (or seriously injured)

One of the most significant risk factors for escalation to the lethal extreme of the domestic violence spectrum is gun possession by the abuser.[31] More than anything else, "[g]uns . . . turn domestic violence into domestic homicide."[32] In 2011, 61% of all female homicide victims were murdered by a husband or intimate acquaintance (defined as a common-law husband, ex-husband or boyfriend).[33] "Of the females killed with a firearm, nearly two-thirds were murdered by male intimates."[34] Studies demonstrate that the presence of a gun in the house increases the probability—making it *six times more likely*—that an abused woman will be killed.[35]

Guns are exceptionally dangerous in the hands of domestic abusers even when they are not used to kill. For example, victims who survive physical assaults involving the use of firearms are very frequently injured, and their injuries are frequently serious.[36]

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by their intimate partner or ex-intimate partner." *See* Campbell, *The Danger Assessment*, *supra* note 27, at 657-58 and Figure 1. As discussed in the next section, the Danger Assessment (or some variation thereof) is now used as part of a strategy to identify and intervene in abusive relationships with a high risk of lethal escalation.

[31] Jacquelyn C. Campbell et al., *Assessing Risk Factors for Intimate Partner Homicide*, 250 NIJ J., Nov. 2003, 14, 16 (hereinafter, "Campbell, *Assessing Risk Factors*").

[32] Violence Policy Ctr., *When Men Murder Women: An Analysis of 2011 Homicide Data: Females Murdered by Males in Single Victim / Single Offender Incidents* 1 (Sept. 2013).

[33] *Id.* at 3.

[34] *Id.* at 6.

[35] Campbell, *Assessing Risk Factors*, *supra* note 31, at 16.

[36] *See generally* Kathryn Ann Farr, *Battered Women Who Were "Being Killed and Survived It": Straight Talk From Survivors*, 17

And, abusers will often brandish firearms even when they do not fire them, an act that occurs far too frequently and that—when used to exert control over a victim—itself constitutes domestic violence.[37] Moreover, even an abuser's threats to use guns are strongly correlated with his propensity to cause physical harm: one study has found that "women who were threatened or assaulted with a gun or other weapon were 20 times more likely than other women to be murdered."[38] For all of these reasons, in his Senate statements in support of the Lautenberg Amendment, Senator Paul Wellstone (D-MN) appropriately observed that "often, the only difference between a battered woman and a dead woman is the presence of a gun."[39]

D. Acceptance of a broad definition of "domestic violence," and an understanding of the risk factors for lethal escalation, are crucial elements of a successful strategy for intervening in high risk cases.

This understanding of domestic violence—as a recurring and escalating spectrum of behaviors,

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Violence & Victims 267, 275-78 (2002) (detailing victims' stories of having survived near-lethal domestic violence). As one study has reported, of the population of women living in a household with a gun, approximately 5% had been shot at by their partners. Susan B. Sorenson & Douglas J. Wiebe, *Weapons in The Lives of Battered Women*, 94 Am. J. of Pub. Health, Aug. 2004, at 1414.

[37] The same study reports that, of the population of women living in a household with a gun, 64.5% had experienced a partner using the gun "to scare, threaten, or harm her." *Id*.

[38] Campbell, *Assessing Risk Factors*, *supra* note 31, at 16.

[39] 142 Cong. Rec. S10,378 (daily ed. Sept. 12, 1996) (statement of Sen. Wellstone).

subject to exacerbation by known risk factors—is crucial to its management and to the prevention of extreme and lethal outcomes.[40] It enables law enforcement agencies, social scientists and public health workers to identify abusers and victims at highest risk for escalated physical violence, including domestic homicide, and to intervene at appropriate times, in ways calculated to defuse the risk and protect the victim.[41] One recently developed—and measurably successful—intervention strategy involves multi-disciplinary "high-risk teams," which coordinate the efforts of social services and non-profit agencies with "those of local police departments, hospitals, state legislatures, and the courts to prevent domestic-violence homicide."[42] These high-risk teams employ a lethality assessment instrument, such as the Danger Assessment[43] or related protocol, to screen for potential lethality; when responses indicate a high risk of escalation, they then develop a case-specific response, including the coordinated and ongoing monitoring and containment of the offender.[44] Among other things, these teams may obtain protective orders on behalf of the victim; suspend or provide supervision for visits between the abuser and his children; move the victim and her children to safe locations, or arrange for the police to drive by and check in at the victim's home; train the victim to deal with emergencies; provide the abuser with counseling for

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[40] *See generally* Albert R. Roberts & Beverly Schenkman Roberts, *A Comprehensive Model for Crisis Intervention with Battered Women and Their Children*, *in Handbook on Domestic Violence Intervention Strategies: Policies, Programs, and Legal Remedies* 365, 365-70 (Albert R. Roberts ed., 2002) (describing physical, emotional and psychological outcomes of abuse to introduce chapter on intervention strategies).

[41] *See, e.g.*, Campbell, *Risk Factors*, *supra* note 28, at 1089 ("[O]ne of the major ways to decrease intimate partner homicide is to identify and intervene with battered women at risk.").

[42] Rachel Louise Snyder, *A Raised Hand*, The New Yorker, July 22, 2013, at 35 (reporting on formation of high-risk team by Jeanne Geiger Crisis Center in Amesbury, Massachusetts). First developed by the Maryland Network Against Domestic Violence, an *Amici* organization, and the Jeanne Geiger Crisis Center in Massachusetts, this multi-disciplinary model is appearing in more and more jurisdictions across the country. *See Lethality Assessment Program*, Maryland Network Against Domestic Violence, http://mnadv.org/lethality/ (last visited Nov. 18, 2013) (and materials provided therein); *What Is The High Risk Team Model*, Jeanne Geiger Crisis Ctr., http://www.jeannegeiger crisiscenter.org/dvhrtn.html?pg=03 (last visited Nov. 18, 2013) (hereinafter, "Jeanne Geiger Crisis Ctr."); Diane L. Rosenfeld,

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The High Risk Team Model and GPS Offender Monitoring: Stopping DV in Its Tracks, 17 Domestic Violence Rep. 33, 34 (Feb./March 2013) (noting that Jeanne Geiger Crisis Center "has provided training to over 3,000 [sites] across the country on danger assessments and creating High Risk Teams . . . ."). Recognizing the success of this model, the United States Congress codified it in March 2013 by adding "multidisciplinary high-risk teams focusing on reducing domestic violence and dating violence homicides" to the Grants to Encourage Arrest and Enforce Protection Orders program of the Violence Against Women Act. *See* Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 102(a), 127 Stat. 54, 71 (2013) (codified as 42 U.S.C. § 3796hh(b)(22)). That same month, the Department of Justice also awarded $2.3 million to twelve cities and counties in ten states to implement the strategy under its new Domestic Violence Homicide Prevention Demonstration Initiative. Press Release, The Office of the Vice President, The White House, Vice President and Attorney General Holder Announce Grants to Help Reduce Domestic Violence Homicides (March 13, 2013), *available at* http://www.whitehouse.gov/the-press-office/2013/03/13/vice-president-biden-and-attorney-general-holder-announce-grants-help-re.

[43] *See* note 30.

[44] Jeanne Geiger Crisis Ctr., *supra* note 42; *see also* Rosenfeld, *supra* note 42, at 33-34.

anger management and substance abuse, and train him in behavior control methods; and in extreme cases, and where local laws allow, they may seek short-term protective custody of an abuser.[45] Last but not least, the high-risk teams will use federal laws such as Sections 922(g)(8) and (9), as well as similar state statutes, to deny high-risk abusers access to firearms, which are implicated in so many domestic homicides.[46]

The goal of this multi-faceted approach is to keep the victim as safe as possible for as long as possible, and certainly until the risk of extreme violence has subsided. (Research shows that a particularly "high-risk time for escalation . . . is at the point when a woman decides to separate, or actually separates, from her abusive partner."[47] In fact, "[e]vidence suggests that when women are killed by an intimate, they are more likely to be living away from their partner at the time."[48]) When it succeeds, this identify-and-intervene strategy nips the pattern of domestic violence in the bud, interrupting it *before* it rises to the level of "strong" or "violent" physical force, up to and including homicide.[49]

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[45] *See e.g.*, Snyder, *supra* note 42, at 40 (describing Jeanne Geiger Crisis Center high-risk teams).

[46] *See id.* (noting that, "[i]n Massachusetts, as in most states, if the abuser has a gun it can be confiscated when a restraining order is issued").

[47] Mary Ann Dutton, *Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman's Syndrome*, 21 Hofstra L. Rev. 1191, 1212 (1993).

[48] *Id.*

[49] The success of these programs is evident in the numbers: using this approach, Maryland has reduced its domestic violence homicide rate by 34% in the past five years and, since 2005, the

The chances of a successful intervention are maximized, therefore, when the various intervention strategies can be deployed at a relatively early stage—e.g., when the abuser has engaged in threats or harassment, or committed the kind of "offensive" contact that is criminalized by misdemeanor battery statutes, but has not yet escalated the abuse to "seriously violent" levels. The ability to deprive early-stage abusers of access to firearms—the power conferred specifically by the Lautenberg Amendment, along with Section 922(g)(8)—is of course a key element of this multi-faceted approach. Effective enforcement of Section 922(g)(9), therefore, is crucial to the continued success of this highly-promising strategy.

II. Congress Enacted Section 922(g)(9) To Close A Loophole In Federal Law And To Prevent Domestic Homicides Committed By Abusers In Possession Of Firearms.

A. Before 1996, Congress had enacted gun-control laws that limited possession of firearms by domestic abusers at both ends of the domestic violence spectrum.

When Congress passed the Lautenberg Amendment in 1996, it understood that gun possession is a

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Jeanne Geiger Crisis Center has intervened in 106 high-risk cases and has had no domestic violence homicides. *Factsheet: The Obama Administration's Commitment to Reducing Domestic Violence Homicides*, The White House (March 13, 2013), *available at* http://www.whitehouse.gov/sites/default/files/docs/dv_homicide_reduction_fact_sheet.pdf. Even outside of this high-risk team model, studies suggest that certain types of community-based intervention services – such as those offered by crisis hotlines, women's groups, social workers, and psychotherapists – yield positive outcomes for battered women. Roberts & Roberts, *supra* note 40, at 366 (citations omitted).

significant predictor of homicide for all domestic abusers, not just those who have already escalated to "strong" or "violent" force. After all, Congress had previously enacted Section 922(g)(8), which bans gun possession by abusers who are civilly restrained from "harassing, stalking or threatening an intimate partner," among other things[50]—forms of domestic violence that can occur without *any* physical contact between abuser and victim. If Congress saw fit to deny guns to abusers who have not yet engaged in physical abuse, then it certainly grasped what experience has established: that guns create a lethal risk when possessed by offenders across the domestic violence spectrum.[51]

Of course, by the time it passed the Lautenberg Amendment, Congress had also proscribed gun possession by domestic abusers convicted of felonies, as part of the general statutory ban against felons-in-possession codified by 18 U.S.C. § 922(g)(1). As of 1996, then, federal law restricted gun possession by abusers at both ends of the spectrum—those convicted of felonies, which presumably involved "strong" or "violent" physical force, and those subject to civil protective orders based on non-physical forms of domestic violence such as verbal threats, harassment and stalking and other conduct that places an intimate partner in reasonable fear of bodily injury.

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[50] 18 U.S.C. § 922(g)(8).

[51] *See* 142 Cong. Rec. S10,378 (daily ed. Sept. 12, 1996) (statement of Sen. Lautenberg) ("[d]omestic violence, no matter how it is labeled, leads to more domestic violence").

B. Until 1996, there were significant loopholes in the statutory regime.

This arrangement, however, left a gap in coverage—or more precisely, it left two gaps. First, Section 922(g) did not cover a large number of extremely violent abusers, who could and arguably should have been prosecuted as felons, but had nevertheless been convicted only under misdemeanor statutes. Senator Lautenberg described this phenomenon when he introduced the legislation that became Section 922(g)(9):

> [M]any people who engage in serious spousal or child abuse ultimately are not charged with or convicted of felonies. At the end of the day, due to outdated laws or thinking, perhaps after a plea bargain, they are, at most, convicted of a misdemeanor. In fact, most of those who commit family violence are never even prosecuted. ***But when they are, one-third of the cases that would be considered felonies, if committed by strangers, are instead filed as misdemeanors.*** The fact is that in many places domestic violence is not taken as seriously as other forms of brutal behavior. Often acts of serious spouse abuse are not even considered as felonies.[52]

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[52] 142 Cong. Rec. S10,377-78 (daily ed. Sept. 12, 1996) (statement of Sen. Lautenberg) (emphasis added); *see also* 142 Cong. Rec. S10,380 (daily ed. Sept. 12, 1996) (statement of Sen. Feinstein) ("[W]e already prohibit convicted felons from possessing a firearm. But it is an unfortunate fact that many domestic violence offenders are never convicted of a felony. Outdated or ineffective laws often treat domestic violence as a lesser offense.").

Though nominally misdemeanants, offenders in this category were at least as dangerous as those convicted of felonies. Indeed, from the perspective of their victims, they were indistinguishable from those convicted of felonies. And yet, for want of an accurate label, federal law allowed them to keep their firearms and failed to mitigate the risk that they would use those guns against the same victims they had already been convicted of abusing.

Second, neither Section 922(g)(1) nor Section 922(g)(8) covered abusers who had been convicted of committing acts of domestic violence in the middle of the spectrum—perhaps not involving "strong" physical force but nevertheless prosecutable under statutes that echo or incorporate the common law by criminalizing "offensive touching" or causing "bodily injury." Although misdemeanors under law, these assaults and batteries are, in fact, classic acts of domestic violence: they characterize an all-too-familiar pattern of abuse that captures offensive contacts like pushing, slapping, and shoving, and often escalates over time into more violent actions, all aimed at exerting power and control over the victim. The victim of such a "misdemeanor" assault may not yet have been subjected to strong or violent physical force, but like all victims of domestic abuse she is exposed to the risk of escalated violence, especially when the situation involves other exacerbating factors—for example, when the abuser has ready access to firearms.

In terms of the force involved and the injuries likely to occur, abusers who have committed these misdemeanor assaults and batteries are already more "violent" than many offenders covered by Section 922(g)(8). Yet even as Section 922(g)(8) banned gun possession by abusers who had been restrained from threats or harassment involving no physical contact, nothing in federal law addressed the danger of leaving guns in the hands of convicted misdemeanants who had actually committed acts of physical domestic violence.

C. The Lautenberg Amendment was enacted to close these loopholes completely and without limitation.

The purpose of the Lautenberg Amendment was to fill these gaps. Section 922(g)(9) was "enacted in order to remedy the nationwide problem that those convicted of a felony involving domestic assault were prohibited from firearms possession while those convicted of a misdemeanor involving domestic assault were not."[53] The purpose of the Amendment, moreover, was to enact a comprehensive remedy that "would establish a policy of zero tolerance when it comes to guns and domestic violence."[54] As Senator Lautenberg and two of his colleagues summed up the legislative history in an amicus brief they submitted to this Court in 2008: "[It] leaves no doubt that the intent behind the Amendment was to close—*completely and without limitation*—the loophole in the current law that allowed domestic abusers to possess firearms when properly convicted under misdemeanor statutes for their acts of abuse."[55]

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[53] *United States v. Barnes*, 295 F.3d 1354, 1364 (D.C. Cir. 2002).

[54] 142 Cong. Rec. S10,377 (daily ed. Sept. 12, 1996) (statement of Sen. Lautenberg).

[55] Brief *Amici Curiae* of United States Senators Frank R. Lautenberg, Dianne Feinstein, and Patty Murray in Support of

III. The Lautenberg Amendment Bans Gun Possession By Abusers Who Have Been Convicted Of "Misdemeanor Crimes Of Domestic Violence" Under Statutes That Criminalize "Offensive Touching" And/Or Contact That Causes "Bodily Injury."

A. The split in the circuits.

To achieve this broad purpose, the Lautenberg Amendment banned gun possession by offenders convicted of "misdemeanor crimes of domestic violence,"[56] and defined that term to include any offense under state, federal or tribal law that has, as an element, the use or attempted use of "physical force."[57]

Three circuits have correctly interpreted "misdemeanor crime of domestic violence" to include offenses proscribed by statutes that permit conviction upon proof of "offensive touching" or contact that causes "bodily injury"—i.e., the kind of misdemeanor assault and battery statutes that are commonly used to prosecute domestic abusers in many states.[58] These

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Petitioner at 9, *United States v. Hayes*, 555 U.S. 415 (2009) (No. 07-608) (emphasis added).

[56] 18 U.S.C. § 922(g)(9).

[57] 18 U.S.C. § 921(a)(33)(A).

[58] *United States v. Griffith*, 455 F.3d 1339 (11th Cir. 2006) (Georgia simple battery statute that criminalized "intentionally mak[ing] physical contact of an insulting or provoking nature" with another person); *United States v. Nason*, 269 F.3d 10 (1st Cir. 2001) (Maine misdemeanor assault statute that made it a crime to cause "bodily injury" or "offensive physical contact"); *United States v. Smith*, 171 F.3d 617 (8th Cir. 1999) (Iowa misdemeanor statute defined assault as any act "intended to cause pain or injury to, or which is intended to result in physical contact which will be insulting or offensive to another").

circuits all took Congress at its word, and reasoned that neither "offensive touching" nor "bodily injury" can be inflicted without a measure of "physical force."

Three circuits, on the other hand, have decided that "physical force," as used in the Lautenberg Amendment, actually means "violent physical force," and thus excludes misdemeanors committed under statutes that criminalize "offensive touching" and other acts involving what they saw as *de minimis* "physical force."[59] And the Sixth Circuit, in the case under consideration, held that "physical force," as used in the Lautenberg Amendment, does not apply to abusers convicted under a state statute that requires proof of "bodily injury;" the Sixth Circuit reasoned that because such laws do "not require proof of a serious physical injury," they authorize convictions where the defendant has caused only "a minor injury" while "using less than strong physical force."[60]

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[59] *United States v. White*, 606 F.3d 144 (4th Cir. 2010) (Virginia statute interpreted to prohibit any offensive touching); *United States v. Hays*, 526 F.3d 674 (10th Cir. 2008) (Wyoming statute prohibiting "rude, insolent or angry touching"); *United States v. Belless*, 338 F.3d 1063 (9th Cir. 2003) (same Wyoming statute). *See also Flores v. Ashcroft*, 350 F.3d 666 (7th Cir. 2003) (interpreting "physical force" in similarly-worded federal immigration statute to mean force that is "violent in nature," and holding that Indiana misdemeanor battery statute did not require proof of such force when it criminalized "intentional touching" done in "a rude, insolent, or angry manner").

[60] *Castleman*, 695 F.3d at 590.

B. Section 922(g)(9) and Section 921(a)(33)(A)(ii) are clear in context, and extend the scope of the Lautenberg Amendment to misdemeanor convictions for "domestic violence" under statutes that require proof of "offensive touching" and "bodily injury."

The Lautenberg Amendment is not limited by its terms, and should not be constricted by judicial interpretation, to predicate offenses that require proof of "violent" or "strong" physical force. There is no need to graft qualifying adjectives onto the statute or to otherwise "alter the plain language of what Congress has written."[61] When read in context, the phrase "physical force" means exactly what it says: that Section 922(g)(9) applies to abusers convicted of misdemeanor crimes of domestic violence under predicate laws that can be satisfied by proof of *any* physical force, including "offensive touches" or contact that causes "bodily injury."

And context, of course, is crucial. In *Johnson v. United States*,[62] this Court interpreted the phrase "physical force" in 18 U.S.C. § 924(e)(2)(B), a statute that enhances punishment for certain defendants who have three previous convictions for a "violent felony." While ruling that, as used in the "violent felony" statute, "the phrase 'physical force' means *violent* force,"[63] the Court disclaimed any intention to determine the meaning of the same phrase elsewhere—and specifically not in the Lautenberg Amendment. Rather, having emphasized that "[u]ltimately, context determines meaning" in matters of statutory interpretation,[64] the Court said that "[w]e have interpreted the phrase 'physical force' only in the context of the statutory definition of 'violent felony.' We do not decide that the phrase has the same meaning in the context of defining a *misdemeanor* crime of domestic violence."[65]

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[61] *Griffith*, 455 F.3d at 1345.

[62] 559 U.S. 133 (2010).

[63] *Id.* at 140 (emphasis in original).

In statutes as in other settings, "words are chameleons, which reflect the color of their environment."[66] Thus, as *Johnson* suggests, it is entirely possible and proper for the same words to have different meanings when used in different statutory contexts.[67] The phrase "physical force" has a different meaning in Section 921(a)(33)(A)(ii) than it does in the "violent felony" statute because of two crucial differences in context: (i) the Lautenberg Amendment is not concerned with "violent" crimes, but with crimes of "domestic violence," and (ii) the Lautenberg Amendment is not concerned with felonies, but with misdemeanors.

Domestic Violence vs. Violence. When it passed the Lautenberg Amendment, Congress was not concerned with the level of physical force that might qualify as "violence" when committed at arm's length between strangers. It was concerned, rather, with the pervasive problem of *domestic* violence—that is, with the abuse inflicted by one intimate partner on another for purposes of coercion and control. This is a crucial distinction. "To an outside observer, domestic violence may look like stranger-to-stranger violence (e.g., punching, slapping, kicking, choking)," but "the intimate context of domestic violence shapes the way in which both the perpetrator and the victim relate to and are affected by the violence."[68]

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[64] *Id.* at 139.

[65] *Id.* at 143-44 (emphasis in original).

[66] *Comm'r of Internal Revenue v. Nat'l Carbide Corp.*, 167 F.2d 304, 306 (2d Cir. 1948).

[67] *See* note 3.

It is in this "intimate context" that the meaning of the Lautenberg Amendment must be discerned. As described above, "domestic violence" is a broad term of art. It denotes any kind of abusive behavior committed by one intimate partner to gain or maintain power and control over the other intimate partner. The sort of "physical force" that might not be described as "violent" in another context—a shove, a slap, unwelcome physical restraint—is nevertheless "domestic violence." Indeed, such "offensive touching" is exactly the sort of "minor contact" that characterizes the early phases of physical domestic abuse, before escalating over time into more violent actions and sometimes—especially where the abuser has access to firearms—culminating in domestic homicide.

The Fourth, Sixth, Ninth, and Tenth Circuits missed the implications of the Lautenberg Amendment's focus on "domestic violence." For example, to support its holding that "mere impolite behavior" is not what Congress had in mind when it defined misdemeanor crimes of "domestic violence," the Ninth Circuit offered the incongruously non-domestic image of Vice President Richard Nixon jabbing Nikita Khrushchev in the chest "with his pointed finger as he expostulated with his face inches away."[69] Nixon's jab may not have been "violent" in its peculiar context, but if replicated between intimate partners in the context of an abusive relationship, and inflicted for purposes of coercion and control, the gesture would certainly constitute "domestic violence." To say that Congress did not have this level of "physical force" in mind when it enacted the Lautenberg Amendment, therefore, is to ignore the most essential feature of the statutory context: the problem it was explicitly enacted to solve.[70]

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[68] Ganley, *supra* note 13, at 17.

[69] *Belless*, 338 F.3d at 1068.

Misdemeanor vs. Felony. In *Johnson*, this Court acknowledged "a more specialized legal usage of the word 'force:' its use in describing one of the elements of the common-law crime of battery. . . ."[71] "The common law held this element of 'force' to be satisfied by even the slightest offensive touching."[72] But the Court found it "unlikely that Congress would select as a term of art defining 'violent felony' a phrase that the common law gave peculiar meaning only in its definition of a misdemeanor" where nothing in the statute under consideration suggested that "physical force," as used there, should "be given its common-law misdemeanor meaning."[73]

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[70] The Tenth Circuit likewise misplaced the hypothetical emphasis by expressing concern about applying the Lautenberg Amendment to the kind of defendant who commits a misdemeanor battery when, "in the midst of an argument, a wife might angrily point her finger at her husband and he, in response, might swat it away with his hand." *Hays*, 526 F.3d at 679. At worst, the Tenth Circuit's illustration embodies the disturbingly retrograde view that there are "two sides to the story" in cases of domestic violence. At best, the scenario is unrealistic and therefore irrelevant: local law enforcement officials are unlikely to spend their limited resources prosecuting a genuinely *de minimis* battery. *See Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007) ("to find that a state statute creates a crime outside the generic definition of a listed crime in a federal statute requires more than the application of legal imagination to a state statute's language").

[71] 559 U.S. at 139.

[72] *Id.* (citations omitted).

Here, again, the context is decidedly different. Because the common-law meaning of "force" applies only to misdemeanors, it does "not fit" a statute that imposes penalties for the commission of a "violent felony."[74] On the other hand, the common-law usage fits perfectly into a statutory definition of "misdemeanor crime." The fit is especially snug because, as a practical matter, the misdemeanor statutes used in many states to prosecute domestic violence implicitly or explicitly incorporate the very same common-law usage of "force" to include "even the slightest offensive touching."[75]

Indeed, in this context, it would be odd to assume that Congress did *not* import the common-law usage into the statute. Why would the legislature explicitly define "misdemeanor crime" in terms of "physical force," but silently exclude from that definition the meaning commonly given to the concept of "force" in misdemeanor statutes? Just as it would be incongruous to interpret a statute that addresses "domestic violence" in a way that effectively reads the word "domestic" *out* of Section 922(g)(9),[76] it defies common sense to interpret a statute enacted to cover "misdemeanor crimes" in a way that effectively reads the word "violent" *into* the phrase "physical force."

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[73] *Id.* at 141.

[74] *Id.* at 139-40.

[75] *See, e.g.*, *Castleman*, 695 F.3d at 590 (predicate Tennessee statute required "proof of just some physical injury, regardless of how slight"); *White*, 606 F.3d at 148 (Virginia assault and battery offenses "incorporate the common law crime"); *Hays*, 526 F.3d at 678-79 (Wyoming statute "follows the common-law rule"). In this context, the "common-law term of art should be given its established common-law meaning." *Johnson*, 559 U.S. at 139.

[76] *See Griffith*, 455 F.3d at 1345.

C. The Fourth, Sixth, Ninth, and Tenth Circuits' interpretation of "physical force" would frustrate legislative intent.

Policy and purpose are elements of context, too. Judicial interpretations of statutes "must give practical effect to Congress's intent, rather than frustrate it."[77] Thus, for example, this Court's decision in *United States v. Hayes*,[78] rested in part on its recognition that an unduly narrow construction of the "domestic relationship" element of Section 921(a)(33)(A)(ii) would "frustrate Congress's manifest purpose," rendering the Lautenberg Amendment "'a dead letter' in some two-thirds of the States from the very moment of its enactment."[79] The Court found it "highly improbable" that Congress meant to extend Section 922(g)(9)'s firearm possession ban to domestic abusers in only a relatively few states.[80]

The narrow construction of "physical force" by the Fourth, Sixth, Ninth, and Tenth Circuits is equally improbable. It, too, would restrict the scope of the Lautenberg Amendment along arbitrary geographic lines. As this Court noted in *Hayes*, the domestic abusers targeted by Section 922(g)(9) are "routinely prosecuted under generally applicable assault or battery laws."[81] But the generic assault and battery statutes of about half the states do not draw distinctions between degrees of "force."[82] These laws either are silent on the matter, and have been interpreted to incorporate common-law concepts,[83] or else they explicitly codify the common-law elements of "offensive touching," causing "bodily injury," or both.[84] Any abuser convicted under one of these statutes—no matter how egregiously "violent" the behavior that prompted his prosecution—will be exempt from Section 922(g)(9).

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[77] *United States v. Heckenliable*, 446 F.3d 1048, 1051 (10th Cir. 2006).

[78] 555 U.S. 415 (2009).

[79] *Id.* at 426-27.

[80] *Id.* at 427.

As interpreted by the Fourth, Sixth, Ninth, and Tenth Circuits, therefore, the Lautenberg Amendment will not close the loophole that existed in pre-1996 law as Congress intended—"completely and without limitation." Section 922(g)(9) rather, will fill the pre-existing gap only incompletely and in a geographically haphazard manner. Victims in some states will benefit from the protection of Section 922(g)(9), but in many other states the Lautenberg Amendment will again be rendered a "dead letter." Victims of "misdemeanor" domestic violence in those jurisdictions will remain exposed to the special kind of risk—and will continue to live with the special kind of fear—that arises when one's abuser has access to firearms. The difference, moreover, will depend on the technical wording of the statute under which an abuser happened to be prosecuted, not on the nature of his conduct or on the quantifiable risk of lethal escalation. This cannot be what Congress intended when it passed the Lautenberg Amendment.[85] It would not have acted to close a loophole by drafting a statute that left that loophole open in at least half of the United States.

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[81] *Id.*

[82] *See* Petition for Writ of Certiorari at 14, *Castleman*, No. 12-1371 (May 17, 2013).

[83] *See, e.g.*, *White*, 606 F.3d at 148 (Virginia statute "incorporate[s] the common law crime of 'assault and battery' without statutory modification or restriction").

[84] *See, e.g.*, Tenn. Code. Ann. §39-13-101.

Interpretations of a statute that would produce such "absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available."[86] Here, the United States has proposed just such an alternative, along the lines already drawn by the First, Eighth and Eleventh Circuits. This interpretation is logically sound, linguistically coherent, and fully consistent with the legislative purpose. The *Amici Curiae* urge the Court to "stick to the common sense approach,"[87] and to allow Section 922(g)(9) to do the important work that Congress enacted it to do.

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[85] *See Nijhawon v. Holder*, 557 U.S. 29, 40 (2009) (rejecting statutory interpretation that would leave provision with little application, because it was doubtful that "Congress would have intended [the law] to apply in so limited and so haphazard a manner").

[86] *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982).

[87] *Griffith*, 455 F.3d at 1345.

CONCLUSION

For the foregoing reasons, the *Amici Curiae* respectfully request that this Court REVERSE the decision of the Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX

IDENTITIES AND INTERESTS OF *AMICI CURIAE*

The following organizations respectfully submit this brief as *Amici Curiae* in support of Petitioner, and urge this Court to overturn the decision of the Sixth Circuit.

The **National Network to End Domestic Violence (NNEDV)** is a not-for-profit organization incorporated in the District of Columbia in 1995 (www.nnedv.org) to end domestic violence. As a network of the 56 state and territorial domestic violence and dual domestic violence sexual assault Coalitions and their over 2,000 member programs, NNEDV serves as the national voice of millions of victimized women, children and men. Working with federal, state and local policy makers and domestic violence advocates throughout the nation, NNEDV helps identify and promote policies and best practices to address victim lethality, advance victim safety and establish best practices for victimless and evidence-based prosecution of domestic violence offences. Additionally, NNEDV serves as a leading voice among various national domestic violence groups and, in that capacity, currently co-chairs the Domestic Violence and Guns Working Group of the National Task Force to End Sexual and Domestic Violence Against Women. NNEDV, which was instrumental to congressional enactment and eventual implementation of the Violence Against Women Acts of 1994, 2000, 2005 and 2013, is deeply concerned that the Sixth Circuit's interpretation of the Lautenberg Amendment will limit the classes of misdemeanants subject to the federal prohibition on firearm possession in contravention of Congress's intent, as well as the resulting impact on victims of domestic violence.

The **National Domestic Violence Hotline (NDVH)** is a not-for-profit organization incorporated in Texas in 1996 (www.ndvh.org) to assist victims of domestic violence to find safety, support, and appropriate services. The NDVH's dedicated advocates and staff have been the vital link to safety for women, men, children and families affected by domestic violence, responding to calls 24 hours a day, 7 days a week, and 365 days a year. Currently answering more than 22,000 calls and online contacts per month, the NDVH provides confidential, one-on-one support to each caller, offering crisis intervention, options for next steps and direct connection to resources for immediate safety. The NDVH makes referrals to over 5,000 agencies and resources in communities all across the country. The NDVH is a member of the national Steering Committee of the National Task Force to End Sexual and Domestic Violence, which provides a collective national voice for federal, state and local policy makers and domestic violence advocates. The NDVH has responded to over 3 million calls for help since first opening the national hotline, and many of these calls are motivated by the victims' fears of firearm violence at the hands of their intimate partners. These calls inform the NDVH's efforts to work with other national organizations to promote policies and best practices to address victim safety and support. Additionally, the NDVH serves as the co-chair (with NNEDV) of the Domestic Violence and Guns Working Group of the National Task Force to End Sexual and Domestic Violence Against Women. The NDVH, on behalf of the millions of callers who have reached out to them since 1996, is interested in ensuring that the Lautenberg Amendment remains a robust tool for protecting the safety of victims of misdemeanor crimes of domestic violence.

The **Domestic Violence Legal Empowerment and Appeals Project (DV LEAP)** was founded in 2003 by a leading domestic violence lawyer and scholar. DV LEAP provides a stronger voice for justice by fighting to overturn unjust trial court outcomes, advancing legal protections for victims and their children through expert appellate advocacy, training lawyers, psychologists and judges on best practices, and spearheading domestic violence litigation in the United States Supreme Court. DV LEAP is committed to ensuring that courts understand the realities of domestic violence and the law when deciding cases with significant implications for domestic violence litigants. DV LEAP has co-authored *amicus* briefs in numerous state courts and to the United States Supreme Court in *Town of Castle Rock, Colo. v. Gonzalez; Davis v. Washington; Hammon v. Indiana; Giles v. California; United States v. Hayes; Abbott v. Abbott; Florence v. Board of Chosen Freeholders;* and *Robertson v. Watson* (concerning enforcement of protection orders). DV LEAP is a partnership of the George Washington University Law School and a network of participating law firms.

Legal Momentum, the Women's Legal Defense and Education Fund, is the nation's oldest legal advocacy organization for women. Legal Momentum advances the rights of all women and girls by using the power of the law and creating innovative public policy. Legal Momentum was one of the leading advocates for passage in 1994 of the landmark Violence Against Women Act, as well as its subsequent reauthorizations, all of which have sought to redress the historical inadequacy of the justice system's response to domestic and sexual violence. Legal Momentum has also represented survivors of domestic and sexual violence, and provided technical assistance materials to the public in housing and employment discrimination-related cases, and matters stemming from the violence. Legal Momentum is also a partner in the National Resource Center on Workplace Responses to Domestic and Sexual Violence (www.workplacesrespond.org), a consortium funded by the U.S. Justice Department in order to help employers proactively adopt workplace violence-related policies and support employees who are experiencing domestic or sexual violence.

The **Arizona Coalition Against Domestic Violence (AzCADV)** was formed in 1980 to unite concerned citizens and professionals to increase public awareness about the issue of domestic violence, enhance the safety of and services for victims of domestic violence, and reduce the incidents of domestic violence in Arizona families. Our mission is to lead, to advocate, to educate, to collaborate, and to end domestic violence in Arizona. AzCADV is based in Arizona and has significant, statewide presence. We are a nongovernmental, non-profit membership organization that works with more than 170 members and allies to carry out our mission. Each year, AzCADV documents homicides, suicides and deaths that occur as a result of domestic violence. Every year, deaths related to guns outnumber all other causes of death by a significant margin, and account for roughly 60% of all domestic violence related deaths in a single year. This has been the case for at least the last 5 years. We recently published a report on the connection between gun violence and domestic violence in Arizona, have served on the Arizonans Against Gun Violence Coalition, and have worked with

Mayors Against Illegal Guns to advocate for background checks on all firearms purchases. AzCADV is deeply concerned that the Sixth Circuit's interpretation of the Lautenberg Amendment will limit the classes of misdemeanants subject to the federal prohibition on firearm possession in contravention of Congress's intent, as well as the resulting impact on victims of domestic violence.

The **Arkansas Coalition Against Domestic Violence (ACADV)** has served both rural and urban areas of Arkansas since its inception in 1981 (www.domesticpeace.com). Our membership consists of domestic violence service providers and others who demonstrate support for the philosophy, goals and objectives of the ACADV. The mission of the ACADV is to eliminate domestic violence and promote healthy families. As a Coalition, our goals are to: strengthen the existing support systems serving victims and their children; develop legislation that provides legal protection to victims; promote public policies which meet the needs of victims; pursue funding for programs working with victims and their children; and provide training for the public and those working with victims.

In certain jurisdictions within our state, victims are still in eminent danger of bodily injury or physical harm even if their aggressor has been ordered to surrender their weapons and ammunitions; this, due to proxy relationships. In other words while abusers do not physically possess firearms, they still have ample access by proxy. In addition, some jurisdictions are leery to issue orders of protection during hunting season, thus minimizing the victim's claim of imminent danger of bodily injury or physical harm. Most recently, it was brought to our attention as a

Coalition that in divorce cases where domestic abuse has been present, a judge has ordered no firearms in the home when children are present, until the children complete a hunter's education course. The ACADV is deeply concerned that the Sixth Circuit's interpretation of the Lautenberg Amendment will limit the classes of misdemeanants subject to the federal prohibition on firearm possession in contravention of Congress's intent, as well as the resulting impact on victims of domestic violence.

The **California Partnership to End Domestic Violence (the Partnership)** is the federally recognized State Domestic Violence Coalition for California. Like other Domestic Violence Coalitions throughout the United States and territories, the Partnership is rooted in the battered women's movement and the values that define this movement, including working toward social justice, self-determination and ending the oppression of all persons. The Partnership has a 30-year history of providing statewide leadership, and has successfully passed over 100 pieces of legislation to ensure safety and justice for domestic violence survivors and their children. We believe that by sharing expertise, advocates and legislators can end domestic violence. Every day we inspire, inform and connect all of those concerned with this issue, because together we're stronger.

The Partnership's mission and work are focused on protecting the safety of domestic violence victims and their children and holding batterers accountable. The Partnership recognizes the deadly intersection of domestic violence and possession of firearms and has worked to support state and federal laws to keep guns out of the hands of domestic violence offenders. The

Partnership is concerned that the Sixth Circuit's interpretation of the Lautenberg Amendment will have a negative resulting impact on victims of domestic violence.

The **Colorado Coalition Against Domestic Violence (CCADV)** is a non-profit statewide membership organization whose mission is to inspire Colorado to end domestic violence. CCADV was established in 1978 as the statewide voice for victims of domestic violence and advocacy organizations, and currently represents over 40 domestic violence programs and allied organizations. Through training, technical assistance, and policy and systems advocacy, CCADV offers comprehensive support of member programs' ability to effectively serve diverse survivors of domestic violence (over 50,000 individuals each year).

CCADV has a long history of advocating for and supporting laws and policies that affect victims of domestic violence, including those which reduce homicides through domestic violence firearms prohibitions. CCADV was instrumental in the enactment and implementation of Senate Bill 13-197, which mandates Colorado courts to enforce federal domestic violence firearms prohibitions and to order prohibited abusers to relinquish their firearms and ammunition. Studies reveal that the presence of firearms significantly increases the lethality of domestic violence incidents; lethality increases further when there has been a history of domestic violence, whether such abuse involved a misdemeanor or felony charge. Policies that prohibit abusers from purchasing firearms and that disarm abusers already in possession of firearms, such as Senate Bill 13-197, are associated with reductions in intimate partner homicides. CCADV is troubled by limitations to the class of misdemeanants who will be disqualified from firearm purchase and possession under the Sixth Circuit's interpretation of the Lautenberg Amendment and the lethal impact such an interpretation will have on victims of domestic violence. The proper resolution of this case is therefore a matter of substantial interest to CCADV and to its members.

The **Connecticut Coalition Against Domestic Violence (CCADV)** is a not-for-profit statewide organization that works to improve social conditions and lead Connecticut's response to domestic violence through policy, advocacy, public awareness, technical assistance and training (www.ctcadv.org). CCADV envisions being the state's leading authority and key agent of change for member agencies and systems that serve victims of domestic violence. Working with federal, state and local policy makers and domestic violence advocates throughout the nation, CCADV helps identify and promote policies and best practices to address victim lethality, advance victim safety and establish best practices for victimless and evidence-based prosecution of domestic violence offences. According to the 2013 Connecticut Domestic Violence Fatality Review Report, firearms remain the most frequently used weapon in intimate partner homicides. Between 2000 and 2011, 66 people in Connecticut were killed by an intimate partner who used a gun. Connecticut law prohibits individuals subject to restraining or protective orders (excluding ex-parte restraining orders) from possessing firearms. Those individuals must either surrender their firearms to law enforcement or sell them to a federally-licensed firearms dealer. While recently enacted gun safety laws in Connecticut will make it more difficult for prohibited persons to obtain firearms from private sellers, more work must be done at the federal level to keep guns out of the hands of domestic abusers.

The **Delaware Coalition Against Domestic Violence (DCADV)**, founded in 1994, is a statewide, nonprofit organization of domestic violence agencies, allied organizations, and supportive individuals. DCADV serves as an "umbrella" organization to many Delaware domestic violence programs, including shelters, hotlines, and victim support/advocacy programs. Over the past 18 years, DCADV's efforts have focused on enhancing the services, legal remedies, and resources available to assist victims of domestic violence while increasing public awareness about the terrible cost of domestic violence in our society, where it is estimated that one in four women will be victimized in her lifetime. DCADV has also seen the state of Delaware receive a ranking as high as second in the nation in the rate of intimate partner violence homicides, most of which were committed with firearms. As Delaware's state domestic violence coalition, DCADV works to address and prevent this critically important problem.

The **DC Coalition Against Domestic Violence (DCCADV)** is a not-for-profit organization founded in 1986 and incorporated in the District of Columbia. As the federally recognized territorial coalition, DCCADV is a membership organization of 12 primary-purpose domestic violence service providers in D.C. DCCADV works to improve the criminal justice response to domestic violence on behalf of those programs and the 30,000 victims they serve each year. D.C. law does not name misdemeanor domestic violence assault, instead all domestic violence-related assaults are charged as "simple assault" and Congress intended for victims of those crimes to be protected by the Lautenberg

Amendment. DCCADV is deeply concerned that the Sixth Circuit's interpretation of the Lautenberg Amendment will limit the classes of misdemeanants subject to the federal prohibition on firearm possession in contravention of Congress's intent, as well as the resulting impact on victims of domestic violence.

The **Florida Coalition Against Domestic Violence (FCADV)** is the non-profit organization that serves as the statewide membership association for Florida's 42 certified domestic violence centers. FCADV recognizes that domestic violence is grounded in an abuse of power by the perpetrator and reinforced through power and control, and serves as the primary representative of survivors of domestic violence and their children in the public policy arena. FCADV is deeply concerned that the Sixth Circuit's interpretation of the Lautenberg Amendment will limit the classes of misdemeanants subject to the federal prohibition on firearm possession in contravention of Congress's intent, and will result in increased danger for victims of domestic violence.

The **Georgia Coalition Against Domestic Violence (GCADV)** is a not-for-profit organization incorporated in the state of Georgia representing 52 local-level domestic violence shelters and non-residential programs throughout the state. Tracing our roots back to 1980, GCADV brings together member agencies, allied organizations and supportive individuals who are committed to ending domestic violence. Guided by the voices of survivors, we work to create social change by addressing the root causes of this violence. GCADV leads advocacy efforts for responsive public policy and fosters quality, comprehensive prevention and intervention services throughout the state.

As a part of its public policy and systems advocacy efforts, GCADV works to address the high domestic violence homicide rate in Georgia. Currently, Georgia ranks 12th in the nation for the rate at which women are killed by men, and we know that roughly 75 percent of our domestic violence homicides are committed using firearms. Prohibiting access to firearms by those who have been convicted of domestic violence crimes is critical in reducing domestic violence homicides. As such, GCADV is deeply concerned that the Sixth Circuit's interpretation of the Lautenberg Amendment will limit the classes of misdemeanants subject to the federal prohibition on firearm possession in contravention of Congress's intent, as well as the resulting impact on victims of domestic violence.

The **Hawaii State Coalition Against Domestic Violence (HSCADV)** is a not-for-profit organization and a statewide partnership of domestic violence programs and shelters, incorporated in the state of Hawai'i in 1980. HSCADV is comprised of the directors of spouse abuse shelters and psycho-educational counseling programs for victims and perpetrators of spouse abuse on each of the islands, as well as the Victim Witness Assistance Division of the Honolulu Prosecutor's Office, Legal Aid Society of Hawaii, Hawaii Immigrant Justice Center, and the Domestic Violence Action Center. Working with all major state and local systems in Hawai'i, HSCADV highlights the concerns of the domestic violence community and identifies gaps and best practices to address the needs of victims to maintain safety. HSCADV is troubled by the Sixth Circuit's interpretation of the Lautenberg Amendment in *United States v. Castleman*, as it fails to acknowledge Congress's intent to provide safety for women and children within their own homes. Domestic violence is one of the most prevalent causes of lethality to women in our country and it would be a miscarriage of justice to decrease the protections to victims under this Amendment by narrowing the class of misdemeanants subject to this federal prohibition.

The **Idaho Coalition Against Sexual & Domestic Violence** is a non-profit organization incorporated in the State of Idaho in 1982 (www.engagingvoices.org) dedicated to engaging voices to create change in the prevention, intervention and response to domestic violence, relationship abuse, stalking and sexual assault. As a membership organization of twenty-six community-based domestic and sexual violence programs and an additional fifty-six governmental and non-governmental organizational allies, the Idaho Coalition Against Sexual & Domestic Violence energizes and activates people, organizations, and communities around the shared vision of compassionate communities with justice, equity and respect for all girls and women, boys and men and a future without violence. The Idaho Coalition Against Sexual & Domestic Violence builds the capacity of programs, organizations and systems to provide safe, accessible and trauma-informed services. The Idaho Coalition Against Sexual & Domestic Violence developed and implemented the Idaho Risk Assessment of Dangerousness to address recidivism and lethality as a best practice for the criminal justice system. The Idaho Coalition Against Sexual & Domestic Violence is deeply concerned that the Sixth Circuit's interpretation of the Lautenberg Amendment will limit the classes of misdemeanants subject to the federal prohibition on firearm possession in contravention of Congress's intent, as well as the resulting impact on victims of domestic violence.

The **Illinois Coalition Against Domestic Violence** is a non-profit organization working to prevent domestic violence across the state of Illinois. The Coalition is a member of the National Network to End Domestic Violence, along with 56 other state and territorial domestic violence coalitions. We provide years of expertise in training, advocacy and technical assistance to and on behalf of 53 member shelters and programs in the state of Illinois. We have followed the progression of *United States v. Castleman* with great interest, and we join the NNEDV in their concern that the Sixth Circuit's interpretation of the Lautenberg Amendment will limit the classes of misdemeanants subject to the federal prohibition on firearm possession and therefore will adversely affect victims of domestic violence in Illinois and across the country.

The **Indiana Coalition Against Domestic Violence (ICADV)** is a not-for-profit organization incorporated in 1980 (www.icadvinc.org) to end domestic violence. ICADV is a statewide alliance of domestic violence and sexual assault programs, law enforcement, prosecutors, criminal justice agencies, faith-based organizations, and concerned individuals. We provide technical assistance, resources and training to those who serve victims of domestic violence; and advocate for social and systems change through public policy, public awareness and education. Additionally, ICADV helps implement policies and best practices to address victim lethality and the law enforcement and criminal justice system response to domestic violence, and to establish shelter-based practices that enhance victim safety. In Indiana, 65% of domestic homicides are caused by a firearm. Many of those individuals should not have been able to possess a gun by federal and state prohibitions. ICADV is deeply concerned that the Sixth Circuit's interpretation of the Lautenberg Amendment will limit the classes of misdemeanants subject to the federal prohibition on firearm possession in contravention of Congress's intent, as well as the resulting impact on victims of domestic violence.

The **Iowa Coalition Against Domestic Violence (ICADV)** is a non-profit organization, incorporated in the State of Iowa in 1985. ICADV provides educational and technical assistance to the domestic violence programs across Iowa, and also acts on a statewide and national level to promote public policy and legislative issues on behalf of battered women and their children. ICADV's purpose is to eliminate personal and institutional violence against women through support and programs providing safety and services to victims of domestic violence. ICADV recognizes that unequal power contributes to violence against women. Therefore, ICADV advocates social change, legal and judicial reform, and the end to all oppression. Since 1995, when the state began gathering data, 134 women, men, and children have been shot to death in domestic violence homicides. Many other victims endure threats and deadly games with firearms, terrifying experiences during which victims fear for their lives. ICADV continues to educate legislators and judges on the importance of keeping firearms out of the hands of batterers.

Jane Doe Inc. (JDI), the Massachusetts Coalition Against Sexual Assault and Domestic Violence, is a statewide organization of about sixty member programs that provide direct services to victims and survivors of sexual and domestic violence. Guided by the voices of survivors, JDI brings together organizations and people committed to ending domestic violence and sexual assault, creating social change by addressing the root causes of this violence, and promoting justice, safety and healing for survivors. JDI advocates for responsible public policy, promotes collaboration, raises public awareness, and supports its member organizations to provide comprehensive prevention and intervention services.

The **Kentucky Domestic Violence Association** is a nonprofit organization founded in 1981 and incorporated in the State of Kentucky. It is dedicated to advocating for safety and justice for battered women and their children, and provides comprehensive services to families through fifteen shelter programs located across the state. Through our hotline, shelter, legal advocacy and community outreach endeavors, we have assisted battered women and their children in trying to establish their safety and stability. Domestic violence is a serious crime with tragic consequences for millions of women and children nationwide. It is well established that the presence of firearms in domestic violence situations threaten to exacerbate an already deadly crisis. Seventy-four percent of homicides in Kentucky are firearm deaths, and almost 40% of homicides occur between partners or family members. There are many compelling reasons for restricting the use and availability of firearms under circumstances like those of domestic violence; such reasons form the underpinnings of the federal gun restrictions associated with protective orders and criminal convictions. The Kentucky Legislature considered the implementation of a statute specifically addressing crimes of domestic violence assault, and enacted KRS 508.032 in 2000. However, this statute only provides for penalty enhancement, based on the relationship between victim and defendant, for a third qualifying offense. The first two assaults would be charged under the general assault statute. Therefore, the Kentucky Legislature chose not to create a specific misdemeanor crime of domestic violence/assault. A decision by this Court that would allow convicted abusers in Kentucky to obtain and possess firearms because our state legislature chose not to enact a specific domestic violence statute, and instead left intact our misdemeanor assault offense that requires only a physical injury and not serious physical violence, would create a grave risk of harm to victims and their children. We therefore join the *amicus* brief submitted by the National Network to End Domestic Violence in support of the United States.

The **Louisiana Coalition Against Domestic Violence** is the federally designated statewide coalition of shelters, non-residential programs and individuals working to end domestic violence in Louisiana. Our programs serve people from everywhere in Louisiana and who come from all backgrounds. We oppose violence as a means of control over others and support equality in relationships. Our mission is to eliminate domestic violence through public education, systems change, social change, and public policy. We promote and strengthen quality comprehensive services for member programs and all individuals affected by domestic violence. The Louisiana Coalition Against Domestic Violence is deeply concerned that the Sixth Circuit's interpretation of the Lautenberg Amendment will limit the classes of misdemeanants subject to the federal prohibition on firearm possession in contravention of Congress's intent, as well as the resulting impact on victims of domestic violence.

The **Maryland Network Against Domestic Violence (MNADV)** is the state domestic violence coalition that brings together victim service providers, allied professionals, and concerned individuals for the common purpose of reducing intimate partner and family violence and its harmful effects on our citizens. The Network accomplishes this goal by providing education, training, resources, and advocacy to advance victim safety and abuser accountability. The MNADV is a nonprofit 501(c)(3) organization incorporated in Maryland in 1981.

The MNADV created the nationally recognized Lethality Assessment Program – The Maryland Model and has received an OVW Technical Assistance grant and a Homicide Prevention Demonstration Initiative award to provide training and technical assistance to participating jurisdictions throughout the United States. The MNADV has also created an innovative, county-based Domestic Violence Fatality Review Team Project that has established teams in 19 of 24 jurisdictions in Maryland.

Every year in Maryland, more than 50% of domestic violence homicides are committed with a firearm. The MNADV strongly supports restricting firearms possession by individuals convicted of misdemeanor crimes of domestic violence and has advocated actively for strong state legislation to prohibit the possession of firearms by domestic violence offenders. Limiting access to firearms will save lives.

The **Michigan Coalition to End Domestic and Sexual Violence (MCEDSV)** is a statewide membership organization (http://www.mcedsv.org) whose members represent a network of more than 70 domestic and sexual violence programs and over 200 allied organizations and individuals. It has provided leadership as the statewide voice for survivors of domestic violence and sexual violence and the programs that serve them since 1978. The organization is dedicated to the empowerment of all of the state's survivors of domestic and sexual violence. Governed by a 12 member board of directors, the 15 member staff of professionals coordinates information sharing, technical assistance and advocacy for the Coalition's 76 member organizations. In addition, the MCEDSV undertakes special projects to enhance the work of its members and to advance the interests of domestic and sexual violence survivors in Michigan. MCEDSV has extensive experience in providing training and technical assistance regarding the issues of sexual assault, domestic violence, stalking and human trafficking, community-based solutions to ending violence, public policy advocacy, coalition building, and systems change. MCEDSV is known as a state and national leader in these areas. We are profoundly concerned about the intersection of firearm use and the safety of women and children in Michigan. MCEDSV is very concerned that the Sixth Circuit's interpretation of the Lautenberg Amendment will limit the classes of misdemeanants subject to the federal prohibition on firearm possession in contravention of Congress's intent, as well as the resulting impact on victims of domestic and sexual violence in Michigan and nationwide.

The **Missouri Coalition Against Domestic and Sexual Violence (MCADSV)** is a not-for-profit organization incorporated in Missouri in 1980. As a membership organization of 125 programs providing domestic and sexual violence services, MCADSV serves as the statewide advocacy, education and communications network to advance the prevention of violence against women and to address the needs of those victimized by the violence. MCADSV is recognized for its successes during the past 30 years in advocacy work with state, local and national policy makers to identify and promote policies and best practices to address victim lethality, advance victim safety and establish best practices for victimless and evidence-based prosecution of domestic violence offences. MCADSV's current CEO worked with advocates and Congress members to draft the original Violence Against Women Act of 1994 and continues to participate in national policy leadership for the implementation of all subsequent reauthorizations of the Act. Therefore, MCADSV, on behalf of domestic violence victims in Missouri and all of the Missouri advocates and programs who serve them, is deeply concerned that the Sixth Circuit's interpretation of the Lautenberg Amendment will limit the classes of misdemeanants subject to the federal prohibition on firearm possession in contravention of Congress's intent, as well as the resulting impact on victims of domestic violence.

The **Minnesota Coalition for Battered Women, Inc. (MCBW)** is a private, non-profit membership organization which serves as a statewide coalition of more than eighty local, regional and statewide grassroots organizations which provide shelter and services to battered women and their families. MCBW provides training and technical assistance for member programs, networking and support for battered women and community education to law enforcement, schools, the general public and others. The member organizations of MCBW, with consultation and assistance provided by MCBW, provide shelter and legal advocacy every year to thousands of battered women.

The mission of MCBW is to end violence against battered women and their children. Resolution of the issues in *United States v. Castleman* will have an impact on domestic violence victims and on the criminal justice system's ability to provide effective protection and intervention on behalf of domestic violence victims in Minnesota. The interpretation of the Lautenberg Amendment will impact the classes of misdemeanants subject to the federal prohibition on firearm possession and widely impact victims of domestic violence.

The **Mississippi Coalition Against Domestic Violence (MCADV)** is a not-for-profit organization incorporated in the state of Mississippi in 1980 to bring about social change through advocacy for victims to end domestic violence. As a statewide organization with national connections with various entities in supporting the cause to end domestic violence, MCADV collaborates with the National Network to End Domestic Violence (NNEDV). We also work with federal, state and local policy makers and domestic violence advocates on issues affecting victims of domestic violence. MCADV stands with NNEDV, a leading voice among various national domestic violence groups, to address an issue with serious ramifications. We are deeply concerned that the Sixth Circuit's interpretation of the Lautenberg Amendment will limit the classes of misdemeanants subject to the federal prohibition on firearm possession in contravention of Congress's intent, as well as the resulting impact on victims of domestic violence.

The **Montana Coalition Against Domestic and Sexual Violence (MCADSV)** is a not-for-profit organization incorporated in the state of Montana in 1986 (www.mcadsv.com). MCADSV is a statewide coalition of individuals and organizations working together to end domestic and sexual violence through advocacy, public education, public policy, and program development. Our mission is to support and facilitate networking among our member organizations while advocating for social change in Montana. MCADSV represents a majority of the state's domestic and sexual violence service providers and is the primary statewide organization providing training and technical assistance to these programs. MCADSV is deeply concerned that the Sixth Circuit's interpretation of the Lautenberg Amendment will limit the classes of misdemeanants subject to the federal prohibition on firearm possession in contravention of Congress's intent, as well as the resulting impact on victims of domestic violence.

The **National Coalition Against Domestic Violence (NCADV)**, a national nonprofit organization founded in 1978 and incorporated in the state of Oregon, provides general information, referrals, and technical assistance to domestic violence service providers and serves as the primary representative of over 2,000 local programs, battered women and their children in the public policy arena. NCADV also provides extensive information and resources to the general public through our website at www.ncadv.org, Facebook and Twitter accounts. NCADV has been a strong and vocal advocate for better protections for victims of violence, particularly related to abusers' access to guns. NCADV is very concerned that the Sixth Circuit's interpretation of the Lautenberg Amendment will limit the classes of misdemeanants subject to the federal prohibition on firearm possession in contradiction to Congress's intent, and the resulting impact on victims of domestic violence that interpretation may create.

The **Nebraska Domestic Violence Sexual Assault Coalition** is a nonprofit statewide advocacy organization committed to the prevention and elimination of domestic and sexual violence. The organization works to enhance safety and justice by changing the beliefs that perpetuate domestic violence and sexual assault. The Coalition supports and builds upon the services provided by its membership network of 21 local programs. The network of programs provided services to nearly 24,000 individuals during a recent 12 month period, including the provision of 70,500 emergency shelter beds for adults and children and answering 47,669 crisis line calls across the state.

The Nebraska Domestic Violence Sexual Assault Coalition is a member of the National Network to End Domestic Violence, and works hand in hand with NNEDV as well as other statewide coalitions to support survivors in a unified and collective approach for our nation. The Nebraska Domestic Violence Sexual Assault Coalition shares the concern of NNEDV and our partnering statewide coalitions that the Sixth Circuit's interpretation of the Lautenberg Amendment will limit the classes of misdemeanants subject to the federal prohibition on firearm possession in contravention of Congress's intent, as well as the resulting impact on victims of domestic violence.

The **Nevada Network Against Domestic Violence** is a not-for-profit organization incorporated in the State of Nevada in 1981 (www.nnadv.org) to end domestic violence. As a network of 11 of the state's 15 domestic violence programs NNADV serves as the statewide voice on domestic violence. Working with federal, state and local policy makers and domestic violence advocates throughout the state, NNADV helps identify and promote policies and best practices to address victim lethality, advance victim safety and establish best practices for victimless and evidence-based prosecution of domestic violence offences. Nevada has led the nation in the number of murders of women by men with handguns for five of the last seven years. This dubious honor heightens our concern that the Sixth Circuit's interpretation of the Lautenberg Amendment will limit the classes of misdemeanants subject to the federal prohibition on firearm possession in contravention of Congress's intent, as well as the resulting impact on victims of domestic violence.

The **New Hampshire Coalition Against Domestic and Sexual Violence (NHCADSV)** is a not-for-profit organization committed to creating safe and just communities through advocacy, prevention and empowerment of anyone affected by sexual violence, domestic violence and stalking in New Hampshire. This mission is accomplished by the Coalition, which includes 14 independent community-based member programs, a board of directors, and a central staff working together to influence public policy on the local, state and national levels; ensure that quality services are provided to victims; promote the accountability of societal systems and communities for their response to sexual violence, domestic violence and stalking; and prevent violence and abuse before they occur. In 2012, NHCADSV member programs provided services to over 16,000 victims. NHCADSV has an interest in this case because it is committed to ensuring the safety of all victims of domestic violence perpetrated through the use of weapons.

The **New Jersey Coalition for Battered Women (NJCBW)** founded in 1977 and incorporated in 1979 is New Jersey's statewide coalition of domestic violence service programs and concerned individuals whose mission is to end domestic violence. NJCBW has expertise in providing information, resources, technical assistance and training to domestic violence programs, the public, and organizations involved with New Jersey's response to domestic violence. NJCBW advocates locally and statewide on a variety of policy matters, including legislation, to end domestic violence and has previously served as *amicus curiae* on a number of cases before the New Jersey Supreme Court. NJCBW believes that the Lautenberg Amendment and its prohibition on firearm possession for those convicted of domestic violence misdemeanors has saved numerous lives and that the Sixth Circuit's interpretation is not only erroneous but will also have serious implications for victims of domestic violence

The **New Mexico Coalition Against Domestic Violence (NMCADV)** is a 501(c)(3) organization that provides training, technical assistance, information, education, referrals and other support to domestic violence programs and stakeholders across New Mexico. We serve as the collective voice for victims of domestic violence and participate actively in systems change efforts statewide. The NMCADV has much reason to raise our collective voice in regards to *United States v. Castleman*. New Mexico's gun-death rate is 40 percent higher than the national average. In 2010, New Mexico had the seventh highest rate in the nation of women being killed by men – the majority of which occurred with a firearm. Children ages 0-19 are killed by guns at a rate almost 60 percent higher than the national average. We proudly join with this *amicus* brief because the majority of domestic violence prosecutions are for misdemeanor offenses and because New Mexico's women and children need more, not less, protection from lethal violence.

The **New York State Coalition Against Domestic Violence (NYSCADV)** is a not-for-profit organization incorporated in the State of New York in 1978 (www.nyscadv.org). NYSCADV works to create and support the social change necessary to prevent and confront all forms of domestic violence. As a statewide network of over 100 local domestic violence member programs, NYSCADV achieves our mission through activism, training, prevention, technical assistance, legislative development, advocacy, and leadership development.

When intimate partner violence is combined with access to firearms, an already potentially lethal combination can be exacerbated. Homicide data from 2009 shows that in New York State, firearms were used in 25% of domestic violence homicides. While statistics and headlines speak mostly to victims of domestic violence murdered with guns, they do not account for the victims of domestic violence who are intimidated or threatened by guns and they do not account for victims of domestic violence that are assaulted by guns or those who survive gunshots. Because of this grim reality, NYSCADV has made it a priority to strengthen laws that relate to the intersection of firearms and domestic violence. Most recently, the NY SAFE Act of 2013 included provisions that strengthened New York State law dictating mandatory and permissive removal of firearms from people who have either a criminal court or family court order of protection issued against them under certain conditions.

NYSCADV is deeply concerned that the Sixth Circuit's interpretation of the Lautenberg Amendment will limit the classes of misdemeanants subject to the federal prohibition on firearm possession in contravention of Congress's intent, as well as the resulting impact on victims of domestic violence. Considering that the risk for serious injury or lethality increase when a firearm is involved, this provision must not be limited.

The **North Carolina Coalition Against Domestic Violence (NNCCADV)** is a not-for-profit organization incorporated in North Carolina in 1982 (www.nccadv.org) to end domestic violence. We represent and assist 50 member programs which serve victims of domestic violence. In addition, NCCADV has hundreds of individual members and other organizations. Working with federal, state and local policy makers and domestic violence advocates throughout the nation, NCCADV helps identify and promote policies and best practices to address victim lethality, advance victim safety and establish best practices for victimless and evidence-based prosecution of domestic violence offences. NCCADV is deeply concerned that the Sixth Circuit's interpretation of the Lautenberg Amendment will limit the classes of misdemeanants subject to the federal prohibition on firearm possession in contravention of Congress's intent, as well as the resulting impact on victims of domestic violence.

The **North Dakota Council on Abused Women's Services (CAWS ND)** is a non-profit membership-based organization incorporated in the state of North Dakota in 1978. CAWS ND is a dual coalition approaching its 35th anniversary growing from a loose network of five organizations to a membership of twenty (20) direct service providers. The rich history of the organization includes not only the nurturing and subsequent growth of a direct service provider network but also a consistent presence working to help shape public policies and systems that are responsive to the needs and experiences of victims of domestic and sexual violence. Guns and domestic violence are a lethal combination. In North Dakota between 1992 and 2011, 53% of homicides involved domestic violence. Persons killed in domestic violence incidents were more likely to be killed with a firearm than those killed in non-domestic incidents. Between 1992 and 2011, abusers used firearms to murder 51 victims of domestic violence. Prohibiting access to firearms from offenders convicted of misdemeanor crimes of domestic violence is essential to providing much needed and often lifesaving protections for victims and survivors of domestic violence.

The **Ohio Domestic Violence Network (ODVN)** is a not-for-profit organization incorporated in the state of Ohio in 1989 to end domestic violence. As a statewide coalition representing 213 member programs, ODVN serves as the statewide voice for victimized women, children and men. As Ohio's largest and most comprehensive resource on domestic violence, ODVN regularly provides information and serves as the link between key stakeholders, including members of the Ohio General Assembly, United States Congress, state agencies, justice system and healthcare profession, domestic violence programs and domestic violence survivors. Through training and technical assistance, ODVN strives to promote victim-centered, evidence-based, and trauma-informed policies, practices and services. Working toward the passage and implementation of the Violence Against Women Act in 1994 and its subsequent reauthorization in 2000, 2005 and 2013, ODVN is deeply concerned that the Sixth Circuit's interpretation of the Lautenberg Amendment will limit the classes of misdemeanants subject to the federal prohibition on firearms possession in contravention of Congress's intent as well as the potential negative and potentially fatal impact on victims of domestic violence.

The **Oklahoma Coalition Against Domestic Violence and Sexual Assault (OCAVSA)** is a not-for-profit organization incorporated in the State of Oklahoma in 1981, to end domestic violence and sexual assault. As the network of 30 state and tribal dual domestic violence sexual assault victim service agencies, OCADVSA serves as the state voice of thousands of victimized women, children and men. Working with federal, state and local policy makers and domestic violence advocates throughout the nation, OCADVSA helps identify and promote policies and best practices to address victim lethality, advance victim safety and establish best practices for victimless and evidence-based prosecution of domestic violence offences. OCADVSA, which was actively involved in the enactment and eventual implementation of the Violence Against Women Acts of 1994, 2000, 2005 and 2013, is deeply concerned that the Sixth Circuit's interpretation of the Lautenberg Amendment will limit the classes of misdemeanants subject to the federal prohibition on firearm possession in contravention of Congress's intent, as well as the resulting impact on victims of domestic violence.

The **Pennsylvania Coalition Against Domestic Violence (PCADV)** is a private non-profit organization working at the state and national levels to eliminate domestic violence, secure justice for all victims, enhance safety for families and communities, and create lasting systems and social change. The first domestic violence coalition in the nation, PCADV was established in 1976 when a handful of grassroots women's groups in the state joined together to lobby for legal protections and to develop a network of services for victims of domestic violence. The Coalition has grown to a membership of 60 organizations across Pennsylvania providing shelters, hotlines, counseling programs, safe home networks, legal and medical advocacy projects, and transitional housing for victims of abuse and their children. Over the past three decades, these programs have offered safety and refuge to close to 2 million victims and their children from every corner of the Commonwealth.

PCADV and its members have long recognized that the removal of firearms from domestic violence perpetrators is crucial for victim safety. Perpetrators use guns to scare, threaten, and harm victims. A firearm in the home greatly increases the likelihood of intimate partner homicide and that statistic bears out in Pennsylvania. In Pennsylvania, firearms are the weapons of choice for domestic violence perpetrators. In 2011, Pennsylvania had 166 domestic violence related fatalities occur and 66% of those deaths involved a firearm. In 2012, 141 fatalities and 62% of those fatalities involved a firearm. PCADV consistently advocates for firearm restrictions that will reduce access to firearms by domestic violence perpetrators. The Lautenberg Amendment is one of the few effective firearms prohibitions for domestic violence perpetrators. Narrowing the interpretation to limit the classes of misdemeanants subject to its provisions will only serve to increase the continued risk of homicide that perpetrators with firearms pose to victims of domestic violence.

The **Rhode Island Coalition Against Domestic Violence (RICADV)** is a not-for-profit organization incorporated in the State of Rhode Island in 1979 (www.ricadv.org) to end domestic violence in Rhode Island. As the statewide coalition, we represent the six independent nonprofit domestic violence agencies in the state (Blackstone Valley Advocacy Center, Domestic Violence Resource Center of South County, EBC Center, Sojourner House, Women's Center of RI, and the Women's Resource Center). We also represent our task force of survivors, SOAR (Sisters Overcoming Abusive Relationships). Together, our member agencies served over 9,400 victims of domestic violence last year, and answered over 13,000 helpline calls from victims, family members and community members seeking support, information and referrals. The RICADV promotes policies and legislation that address victim lethality, advance victim safety and establish best practices for victimless and evidence-based prosecution of domestic violence offences. We have worked in concert with the National Network to End Domestic Violence and other advocacy organizations to promote federal legislation that protect victims and holds abusers accountable. The RICADV is deeply concerned that the Sixth Circuit's interpretation of the Amendment will limit the classes of misdemeanants subject to the federal prohibition on firearm possession in contravention of Congress's intent, as well as the resulting impact on victims of domestic violence.

The **South Carolina Coalition Against Domestic Violence and Sexual Assault (SCCADVASA)** is a statewide coalition made up of 23 domestic violence and sexual assault advocacy programs in South Carolina. Since 1981, SCCADVASA has been a leader in our state in representing the critical needs of survivors and their families. Our mission is to end domestic violence and sexual assault in South Carolina by influencing public policy, advocating for social change, and building the capacity of member programs, allied organizations, and communities across the state. Sadly, South Carolina was just ranked number one in the nation for the number of women killed by men (Violence Policy Center). Ninety-three percent of these reported homicides were murdered by someone they knew and 63% by an intimate partner. Fifty-two percent were killed with guns. SCCADVASA is deeply concerned that the Sixth Circuit's interpretation of the Lautenberg Amendment will limit the classes of misdemeanants subject to the federal prohibition of firearm possession in contravention of Congress's intent, as well as the resulting impact on victims of domestic violence.

The **South Dakota Coalition Ending Domestic and Sexual Violence (SDCEDSV)** is a not-for-profit organization incorporated in the State of South Dakota in 1978 to end domestic violence and sexual assault As a network of the 25 domestic and sexual violence shelter programs, SDCEDSV serves as the state voice of hundreds of victimized women, children and men. Working with federal, state and local policy makers and domestic violence advocates throughout the state and nation, SDCEDSV helps identify and promote policies and best practices to address victim lethality, advance victim safety and establish best practices for victimless and evidence-based prosecution of domestic violence offences. SDCEDSV, which was instrumental to congressional enactment and eventual implementation of the Violence Against Women Acts of 1994, 2000, 2005 and 2013, is deeply concerned that the Sixth Circuit's interpretation of the Lautenberg Amendment will limit the classes of misdemeanants subject to the federal prohibition on firearm possession in contravention of Congress's intent, as well as the resulting impact on victims of domestic violence.

The **Tennessee Coalition to End Domestic and Sexual Violence** is a not-for-profit organization incorporated in the State of Tennessee in 1988 (www.tncoalition.org) to end domestic violence in the State of Tennessee. The Coalition is the statewide network of 5 domestic violence programs, rape crisis centers, individuals and allies working to end violence in Tennessee.

The Coalition actively works with state and local policy makers and domestic violence advocates throughout the state identifying and promoting policies and best practices to address victim safety. The Coalition is a member of the Domestic Violence State Coordinating Council, a state-wide council focusing on policy issues and training related to domestic violence victims. The Council is comprised of representatives from the courts, law enforcement, and social services.

Over the years, the Coalition has worked to ensure that perpetrators of domestic violence are properly denied possession of a firearm. The Coalition led the effort to ensure that respondents under order of protection or those convicted of a misdemeanor crime of domestic violence could not possess a firearm. The Coalition also worked with legislators on a felons-in-possession statute that specifically prohibited the possession of firearms by those convicted of domestic violence crimes.

The Coalition believes that a restrictive reading of the language of the Tennessee domestic assault statute will result in an increased amount of victims being killed by their intimate partners, and defeat the intent of Congress to ensure that perpetrators of domestic violence are prohibited from possessing a firearm.

The **Virginia Sexual and Domestic Violence Action Alliance (VSDVAA)** is a not-for-profit organization incorporated in Virginia in 1981 (www.vsdvalliance.org) to create a Virginia free from sexual and domestic violence. We are Virginia's leading voice on sexual and domestic violence. Over the past 30 years, we built an extensive network of agencies and individuals to speak in a unified voice on issues related to sexual and domestic violence. Our membership includes advocates at local accredited domestic and sexual violence service agencies, survivors, attorneys, law enforcement officers, health professionals and community members.

Guns and domestic violence are a lethal combination. The Virginia Medical Examiner's 2010 report of a ten-year review of family and intimate partner homicide in Virginia revealed that 60.5% of all intimate partner violence homicide victims were killed with a firearm. Recognizing the significant risk that exists when a perpetrator of domestic violence has access to firearms, VSDVAA supports laws that prohibit the purchase, transport and possession of firearms for persons subject to protective orders and/or who have been convicted of assault and battery of a family or household member.

VSDVAA is deeply concerned that the Sixth Circuit's interpretation of the Lautenberg Amendment will limit the classes of misdemeanants subject to the federal prohibition on firearm possession in contravention of Congress's intent, as well as the resulting impact on victims of domestic violence. In Virginia, we've seen limits on the application of the federal prohibition on firearm possession following a similar decision in the Fourth Circuit. The Virginia State Police reported in 2012 that in the year following the Fourth Circuit's decision the number of transactions denied for prior domestic assault and battery convictions fell from approximately 500 to 80. Law enforcement, prosecutors, and advocates in Virginia are concerned about the resulting impact this will have on victim safety in the Commonwealth.

The **Vermont Network Against Domestic and Sexual Violence** is a not-for-profit organization incorporated in the State of Vermont in 1986 (www.vtnetwork.org) to end domestic and sexual violence. As a network of the 14 non-profit organizations providing direct services to victims of domestic and sexual violence, and providing communities with education and outreach to prevent domestic and sexual violence in Vermont, the Vermont Network Against Domestic and Sexual Violence serves as the statewide voice of thousands of victimized women, children and men. Working with federal, state and local policy makers and domestic violence advocates throughout the state, the Vermont Network Against Domestic and Sexual Violence helps identify and promote policies and best practices to advance victim safety, support offender accountability, and promote and support best practices for the prevention of domestic and sexual violence. Additionally, the Vermont Network Against Domestic and Sexual

Violence serves as a leading voice among various statewide groups and agencies and in that capacity currently collaborates with Governor Peter Shumlin's administration to create public policy around and access to firearm storage in domestic violence cases. The Vermont Network Against Domestic and Sexual Violence, which was instrumental to congressional enactment and eventual implementation of the Violence Against Women Acts of 1994, 2000, 2005 and 2013, is deeply concerned that the Sixth Circuit's interpretation of the Lautenberg Amendment will limit the classes of misdemeanants subject to the federal prohibition on firearm possession in contravention of Congress's intent, as well as the resulting impact on victims of domestic violence.

Incorporated in 1981, the **West Virginia Coalition Against Domestic Violence (WVCADV)** is a statewide, non-profit organization dedicated to the elimination of domestic violence and to the transformation of social systems that support non-violence, accountability, and economic self-sufficiency in diverse family structures and intimate relationships. To achieve this end, the Coalition Statewide Office (the Coalition) coordinates efforts in public policy, legislative advocacy, resource development, public information, training programs, and collection and storage of aggregate data from member programs. The Coalition prioritizes raising public awareness regarding the devastating social, economic, cultural, personal, and spiritual impact of domestic violence; and works collaboratively at local, state, and national levels. The Coalition's fourteen member programs provide direct services to victims and operate outreach offices throughout the state. Direct service providers respond to the needs of victims on a 24-hour basis by providing the following services: safe emergency housing, case management, peer counseling and group support, information and referral, advocacy, and victims' rights information. Each program's service area varies from two to eight counties and provides direct services through residential and outreach centers. The Coalition and member programs work together to develop a strong network of shared resources and support.

Firearms and domestic violence are a deadly combination. Abusers who gain access to firearms pose a lethal threat both to those they have abused and to the wider community. Firearms are the weapons of choice among abusers who kill their intimate partners and children in West Virginia. From October 1, 2012 through September 30, 2013, there were 20 domestic violence homicides in West Virginia. A firearm was used in 55% of the homicides. In a study conducted by Marshall University, researchers found that 51.4% of domestic violence victims believed that their abuser would use a firearm on them. Guns were also present during the abuse in 61 % of police reports filed.

End Domestic Abuse Wisconsin (End Abuse) is the leading voice for victims of domestic abuse in Wisconsin. End Abuse is a coalition of domestic violence victim programs, domestic violence survivors and individuals who share a common vision of ending domestic abuse in Wisconsin. End Abuse has consistently worked to promote more rigorous enforcement of firearm restrictions to disarm batterers and save lives. End Abuse and its members believe the Sixth Circuit's interpretation of the Lautenberg Amendment will eliminate or very severely limit the ability of that provision to protect victims of domestic violence in Wisconsin.

The **Wyoming Coalition Against Domestic Violence and Sexual Assault (WCADVSA)** is a not-for-profit organization incorporated in the state of Wyoming. Our mission is to end sexual and physical violence particularly towards women and children. All 24 local domestic violence sexual assault programs are members of our Coalition and we serve as the statewide voice of the victimized women, children and men who live in Wyoming. Working with federal, state and local policy makers and domestic violence and sexual assault advocates throughout the state, WCADVSA helps identify and promote policies and best practices to address victim issues. The WCADVSA is deeply concerned that the Sixth Circuit's interpretation of the Lautenberg Amendment will limit the classes of misdemeanants subject to the federal prohibition on firearm possession in contravention of Congress's intent, as well as the resulting impact on victims of domestic violence.

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In The
Supreme Court of the United States

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UNITED STATES OF AMERICA,

Petitioner,

v.

JAMES ALVIN CASTLEMAN,

Respondent.

◆

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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BRIEF *AMICUS CURIAE* NEW YORK STATE ASSOCIATION OF CHIEFS OF POLICE IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*[1]

The New York State Association of Chiefs of Police writes in support of the Petitioner, the United States of America.

The New York State Association of Chiefs of Police is a not-for-profit organization; its membership composed of the most experienced and respected law enforcement officials in the State of New York. Current and past membership includes Police Chiefs, Commissioners, Superintendents, Executives, Administrators, and Agents-in-Charge. The Association advances the general welfare of the police profession through the education of its members, and its ultimate goal is to develop a more efficient and effective law enforcement and criminal justice system.

Amicus have a strong interest in this case based on their familiarity with the training of officers and officers' purposes in responding to domestic violence calls. *Amicus* are in a position to assist the Court in this case because its importance is not limited to the parties. The outcome of the case will affect all law enforcement agencies across their State and across the country. Victims of domestic abusers legitimately demand effective law enforcement and look to the *amicus* to provide protection from abusers.

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[1] Pursuant to Rule 37.6 of the Supreme Court of the United States, no counsel for a party authored this brief in whole or in part and no counsel or party made a monetary contribution to the preparation or submission of the brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief and letters of consent have been filed with the Clerk pursuant to Rule 37.2 of the Supreme Court of the United States.

◆

SUMMARY OF THE ARGUMENT

"For many battered women and abused children, whether their abuser gets access to a gun will be nothing short of a matter of life and death."[2]

Violence between intimate partners is not exclusively exhibited as physical force or dominance. To permit Congress to address only domestic violence that presents itself as physical abuse alone is at best inept, and at worst, a fatal miscalculation. The Sixth Circuit's holding on appeal unduly restricts the enforceability of the Gun Control Act (18 U.S.C. § 922) and the Lautenberg Amendment (18 U.S.C. § 922(g)) by limiting the definition of a "misdemeanor crime of domestic violence" to assault and battery offenses requiring *strong and violent physical force*.[3] This limitation permits domestic abusers to possess weapons and endangers the safety of victims, members of law enforcement, and the general public.

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[2] 142 Cong. Rec., S11876 (Sept. 30, 2006) (Floor Statement of Senator Frank Lautenberg).

[3] *United States v. Castleman*, 659 F.3d 582 (2012).

An informed, evidence-based understanding of domestic violence encompasses the exertion of power and control, including but not limited to physical violence. The U.S. Department of Justice defines domestic violence as:

> a pattern of abusive behavior in any relationship that is used by one partner to gain or maintain power and control over another intimate partner. Domestic violence can be physical, sexual, emotional, economic, or psychological actions or threats of actions that influence another person. This includes any behaviors that intimidate, manipulate, humiliate, isolate, frighten, terrorize, coerce, threaten, blame, hurt, injure, or wound someone.[4]

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[4] U.S. Department of Justice, Office on Violence Against Women, *Domestic Violence*, *available at* http://www.ovw.usdoj.gov/domviolence.htm (updated March 2013). Domestic violence has also been recognized as a human rights violation. Rashida Manjoo declared that "Domestic Violence or Intimate Partner Violence (IPV) is a pervasive human rights violation that continues to affect women across the United States." Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences, Ms. Rashida Manjoo (June 6, 2011). In its report responding to the petition presented on behalf of Jessica Lenahan, the Inter-American Commission on Human Rights (IACHR) asserted that "[d]omestic violence, for its part, has been recognized at the international level as a human rights violation and one of the most pervasive forms of discrimination, affecting women of all ages, ethnicities, races and social classes." The IACHR, in its report, affirmed that States must take positive action to ensure that individuals within their jurisdiction can exercise their human rights, and that States may be liable for

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Similarly, Johns Hopkins University's "Danger Assessment," a scientifically tested fatality predictor for women experiencing domestic violence,[5] illustrates that violence between intimate partners appears as dominance and control through various means, such as economic, emotional and psychological abuse. Of its twenty questions, only a few of the assessment's questions reference physical force.[6] The Gun Control Act embraces this modern understanding of the crime of domestic violence, acknowledging that the crime is not limited to violent physical force.[7] The plain meaning of the Act and its legislative history fully support a more inclusive application of the firearms restriction – one of the few tools that police and prosecutors have to prevent officer and victim fatalities.

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ARGUMENT

I. Restricting Domestic Abusers' Access to Firearms Enhances Public Safety

Domestic violence threatens public safety. Abusers who have firearms are more likely to perpetrate

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the action of non-state actors that violate the human rights of individuals within their jurisdiction. Therefore, the duty of States includes "prevention and response to the acts of private actors."

[5] Johns Hopkins School of Nursing, Danger Assessment, *available at* http://www.dangerassessment.org/DA.aspx.

[6] *Id.*

[7] Gun Control Act of 1968, 18 U.S.C. § 922 (1994), amended by 18 U.S.C. § 922(g)(9) (1996).

lethal violence against not only women and children,[8] but also police officers[9] and the general public, in the form of mass shootings.[10] There is a strong correlation between lenient gun laws and an increase in gun violence, generally.[11] In the context of domestic violence, there is also a correlation between firearms possession and death. Therefore, when prosecutors' efforts to restrict abusers' access to firearms are hampered by an incorrect application of federal law, public safety is compromised and lethal violence is likely to increase.

A. Victim Safety Correlates to Firearms Possession

Perpetrators of domestic violence use firearms to threaten, intimidate, assault and kill their victims.[12]

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[8] *See* infra part IA.

[9] *See* infra part IB.

[10] *See* infra part IC.

[11] Arkadi Gerney, Chelsea Parsons, and Charles Posner, Center for American Progress, *America Under the Gun: A 50-State Analysis of Gun Violence and Its Link to Weak State Gun Laws*, April 2, 2013, *available at* http://www.americanprogress.org/issues/civil-liberties/report/2013/04/02/58382/america-under-the-gun/.

[12] A recent study revealed sixty-five percent (65%) of domestic violence victims residing in a shelter who previously lived in homes with guns reported their abuser using a gun to "scare, threaten or harm them." Shannon Frattaroli, Johns Hopkins Center for Gun Policy and Research, Removing Guns from Domestic Violence Abusers: An Analysis of State Level Policies to Prevent Future Abuse (Oct. 2009) (citing Sorenson & Wiebe), *available*

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Between 2007 and 2011, the United States Department of Justice reported that a gun was used in 195,700 incidents of non-fatal, "violent" domestic abuse between intimate partners.[13] In addition to non-fatal incidents, the link between access to firearms and victim fatality, especially female victims, is also well established. A firearm is the "most common weapon used by men to murder women, with nearly two-thirds of the women [homicide victims] having been murdered by male intimate partners."[14] In homicides of intimate partners, firearms are the most frequently used type of weapon.[15] An abuser's access to firearms in a home plagued by a history of domestic violence increases the risk of intimate partner

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at http://www.jhsph.edu/research/centers-and-institutes/johns-hopkins-center-for-gun-policy-and-research/publications/RemovingGunsfromIPVOffenders7Oct09.pdf. Research indicates owning a gun is highly correlated with using the gun as a means to threaten and control intimate partners. E. Rothman, D. Hemenway, M. Miller, and D. Azrael, *Batterers' Use of Gun to Threaten Intimate Partners*, J. of the Amer. Med. Women's Assoc. 60, 62-68 (2005).

[13] Michael Planty & Jennifer L. Truma, U.S. Department of Justice, *Firearm Violence: 1993-2011*, May 2013, *available at* http://www.bjs.gov/index.cfm?iid=4616&ty=pbdetail.

[14] Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences, Ms. Rashida Manjoo (June 6, 2011).

[15] "On average, 3.5 people are killed by intimate partners every day in the United States. . . . About 60 [percent] of these homicides were committed using a firearm." Elizabeth R. Vigdor & James A. Mercy, *Do Laws Restricting Access to Firearms by Domestic Violence Offenders Prevent Intimate Partner Homicide?*, 30 Eval. Rev. 313 (2006) (citations omitted).

homicide by twenty (20) times.[16] Abusers with a history of intimate partner violence are more likely to murder their intimate partner,[17] and the risk of female homicide increases by five hundred percent (500%) when an abuser has access to firearms.[18] Restricting access to firearms is one of the most effective ways to decrease these lethality rates.

B. Responding Law Enforcement Officers Are Safeguarded When Abusers' Access to Firearms is Restricted

The presence of firearms in a home where domestic violence is occurring compromises police officer safety. "Guns in the hands of dangerous individuals and criminals pose a significant threat to police officers."[19] The Federal Bureau of Investigation (FBI), assessing law enforcement officers assaulted and killed on the job, recognizes the heightened "potential hazard to an officer [when responding to] a domestic disturbance call."[20] The Chairman and CEO of the National Law Enforcement Officers Memorial Fund describes the threat to officers in responding to a domestic violence situation as follows:

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[16] Johns Hopkins Bloomberg School of Public Health, Center for Gun Policy and Research, *Firearms and Intimate Partner Violence*, *available at* http://www.jhsph.edu/research/centers-and-institutes/johns-hopkins-center-for-gun-policy-and-research/publications/ [hereinafter *Firearms and Intimate Partner Violence*].

[17] Gerney, *supra* note 11 at 14 (citing *Firearms and Intimate Partner Violence*, *supra* note 15). Specifically, the risk of intimate partner homicide increases by 20 times when there is a history of domestic violence. Mayors Against Illegal Guns, Gun Laws and Violence Against Women Fact Sheet, 2, *available at* http://libcloud.s3.amazonaws.com/9/e9/e/1726/Gun_Laws_and_Violence_Against_Women.pdf.

[18] *Id.* (citing J.C. Campbell, D.W. Webster, J. Koziol-McLain, et al., *Risk Factors for Femicide within Physically Abusive Intimate Relationships: Results from a Multi-Site Case Control Study*, 93 Amer. J. of Public Health 1089-97 (2003)).

> No assignment poses more uncertainty and danger to a law enforcement professional than a domestic disturbance call. The circumstances are emotionally charged, and weapons, alcohol and drugs are often involved. An officer who responds as a peacekeeper often becomes a target of the violence.[21]

The death of Officer John Falcone at the hands of an armed abuser illustrates the danger. In 2011, Officer Falcone responded to a report of shots fired in Poughkeepsie, New York.[22] Upon arrival, Officer

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[19] Gerney, *supra* note 11.

[20] Cary Arberg, Domestic Disturbances: Deadly, Dangerous Calls, National Law Enforcement Memorial Fund (April 2011).

[21] Campus Safety, Domestic Violence Takes a Heavy Toll on the Nation's Law Enforcement Community, *available at* http://www.campussafetymagazine.com/Channel/Mass-Notification/News/2007/10/09/Domestic-Violence-Takes-a-Heavy-Toll-on-Law-Enforcement-Community.aspx (National Law Enforcement Officers Memorial Fund Press Release: October 8, 2008).

[22] Larry Hertz, *City Mourns Officer John Falcone, "An Outstanding Member" of Police Department*, POUGHKEEPSIE

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Falcone encountered a man waving a gun and carrying a young child.[23] The man had just murdered his wife while holding his son. The couple had a long history of domestic violence prior to this final incident. Officer Falcone engaged in a struggle with the man after rescuing the child and handed the boy to a bystander.[24] During the struggle, Falcone was shot in the head and killed by the man before he turned the gun on himself.[25] Officer Falcone had served on the force for eighteen (18) years, and was forty-four (44) years old at the time of his death.[26]

Between 1996 and 2009, fourteen percent (14%) of law enforcement officer murders were carried out while the officer was responding to a domestic disturbance call; ninety-seven percent (97%) of these deaths were perpetrated with a firearm.[27] A majority of law enforcement deaths that occur when responding to a domestic violence situation occur "without any warning, before [the officer] ha[s] made contact with the domestic violence suspect, and before [the]

JOURNAL (Feb. 19, 2011), *available at* http://www.poughkeepsiejournal.com/article/20110219/NEWS05/102190338/.

[23] Officer Down Memorial Page, *Detective John M. Falcone*, *available at* http://www.odmp.org/officer/20752-detective-john-m-falcone.

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] Shannon Meyer & Randall H. Carroll, *When Officers Die: Understanding Deadly Domestic Violence Calls for Service*, 78 THE POLICE CHIEF 24 (May 2011).

officer[ ] perceive[s] any immediate threat to [his or her] safety."[28] Therefore, the most effective means of reducing the incidence of officer fatalities that occur while responding to domestic calls is to prevent firearms from being present at the scene by removing these weapons from the hands of domestic abusers.

C. The Proliferation of Mass Shootings May Decelerate When Abusers' Access to Firearms is Restricted

The increase in mass shootings, and the fact that many are often connected in some way to domestic violence, warrants the strict enforcement of existing federal firearms statutes as envisioned by Congress. Mayors Against Illegal Guns analyzed ninety-three (93) mass shootings (defined as shootings involving four (4) or more victims) occurring between January 2009 to September 2013.[29] In fifty-seven percent (57%) of the cases, the "shooter killed a current or former spouse, intimate partner or other family member" in the course of the mass shooting event.[30] In seventeen (17) of these mass shootings, the shooter had a prior domestic violence charge.[31] Therefore, where prosecutors can remove firearms from abusers' hands, at least this sub-set of mass shootings could be prevented or reduced in severity. Although a number of more restrictive regulatory proposals to curb mass shootings and gun violence have failed to gain political support, this more targeted approach requires mere enforcement of existing law.

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[28] Arberg, *supra* note 20.

[29] Mayors Against Illegal Guns, *Analysis of Recent Mass Shootings* (Sept. 2013), *available at* https://s3.amazonaws.com/s3.mayorsagainstillegalguns.org/images/analysis-of-recent-mass-shootings.pdf.

[30] *Id.*

[31] *Id.*

II. The Plain Meaning of the Lautenberg Amendment Expressly Includes Predicate Misdemeanor Crimes that Do Not Require an Element of Violent Physical Force

As defined in 18 U.S.C. § 921(a)(33)(A) (the Firearms Statute), a "misdemeanor crime of domestic violence" includes "*any offense*" committed against a person with a specified domestic relationship "that is a misdemeanor under Federal, State, or Tribal law," and has as an element,

1) the use of physical force, **or**
2) the *attempted use* of physical force, **or**
3) the *threatened use* of a deadly weapon.[32]

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[32] § 921(a)(33)(A) (*emphasis added*). "Under the final agreement, the ban applies to crimes that have, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon. This is an improvement over the earlier version, which did not explicitly include within the ban crimes involving an attempt to use force, or the threatened use of a weapon, if such an attempt or threat did not also involve actual physical violence. In my view, anyone who attempts or threatens violence

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The Firearms Statute therefore unambiguously defines two of the three elements of a predicate misdemeanor offense without any mention of strong and violent physical force. A well-settled canon of statutory interpretation instructs that, "courts must presume that a legislature says in a statute what it means and means in a statute what it says there."[33] When the words of a statute are clear and unambiguous, "judicial inquiry is complete."[34]

The use of "attempted" and "threatened" language demonstrates Congress's intent to include misdemeanor crimes requiring no actual physical force as a predicate "misdemeanor crime of domestic violence."[35] As such, even a state misdemeanor crime involving the attempted use of force or the threatened use of a deadly weapon triggers the provisions of the Lautenberg Amendment. If Congress intended for a predicate offense to trigger the Lautenberg Amendment's protections only when violent physical force was an element of the misdemeanor conviction, then Congress would not have included the "attempted use of physical force" and the "threatened use of a deadly

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against a loved one has demonstrated that he or she poses an unacceptable risk, and should be prohibited from possessing firearms." 142 Cong. Rec., S11876 (Sept. 30, 2006) (Floor Statement of Frank Lautenberg).

[33] *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-54 (1992).

[34] *Id.*

[35] § 921(a)(33)(A); *see* Petitioner-Government, Petition for a Writ of Certiorari, No. 12-1371, *U.S. v. Castleman*, at 10-14.

weapon" in its definition of the predicate offense.[36] Just as attempts and threats of force do not necessarily involve violent physical force, neither does domestic violence.

The lower court's selective citation of the statutory language also obscures the plain meaning in order to advance an incomplete statutory analysis. By removing the word "domestic" from the statutory definition of a predicate misdemeanor offense, the Sixth Circuit provides an argument that rests on a false premise:

> [B]ut the government asks us to put more weight on the term "misdemeanor" than Congress meant the term to bear. Had Congress intended the word "misdemeanor" to have the effect suggested by the government, then Congress would have had no need to modify "misdemeanor" with the phrase "***crime of violence***." Congress could simply have prohibited any person convicted of a "misdemeanor domestic assault or battery offense" from possessing a firearm. It chose not to do so.[37]

This reading mistakes what the term "misdemeanor" modifies. Contrary to the Court's conclusion that "misdemeanor" is modified by the phrase "crime of violence," in the Firearms Statute, "misdemeanor" is modified by the phrase "crime of ***domestic*** violence." The Court errs in removing the word "domestic" from their analysis of the statute's plain meaning. Focused on the term "violence" alone, the Court ignored Congress's deliberate use of "domestic violence" and all non-physical crimes reflected in those two words that together encompass much more than violent physical force. The plain language of the statute, therefore, contradicts the Sixth Circuit's reading.

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[36] *Id.*

[37] *Castleman*, 695 F.3d at 588 (*emphasis added*).

III. The Sixth Circuit's Statutory Interpretation Frustrates Congress's Manifest Purpose to Prohibit Domestic Abusers' Access to Firearms

Examining the legislative history of the Gun Control Act and the Lautenberg Amendment further bolsters the plain meaning of the statutes.[38] Inconsistent

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[38] *See Zuni School District No. 89 v. Department of Education*, 550 U.S. 81, 93 (2007) (relying on legislative history and congressional purpose when interpreting the statute at issue). In a concurring opinion, Justice Stevens declared, "Analysis of legislative history is, of course, a traditional tool of statutory construction. There is no reason why we must confine ourselves to, or begin our analysis with, the statutory text if other tools of statutory construction provide better evidence of congressional intent with respect to the precise point at issue." *Id.* at 106. (Stevens, J., concurring); *see Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 610-12 (1991) ("Our precedents demonstrate that the Court's practice of utilizing legislative history reaches well into its past . . . We suspect that the practice will likewise reach well into the future.").

Circuit Court decisions interpreting the force necessary to constitute a "misdemeanor crime of domestic violence", including the one currently on appeal, have caused ambiguities in states' application of the Lautenberg Amendment.[39] A close examination of the Congressional record assists in resolving these conflicts.[40]

A. Congressional Intent Informs the Proper Application of the Lautenberg Amendment

In *U.S. v. Hayes,*[41] this Court referred to the purpose of the Gun Control Act to resolve inconsistent application of federal law.[42] This Court relied upon the legislative history and Congressional intent to support its holding that whether a crime involves domestic violence depends on the perpetrator's relationship to the victim rather than the elements of the offense.[43] Similarly, in the matter currently before the Court, circuit conflicts exist regarding the degree of force required to prompt the application of the firearms restriction.[44] Despite acknowledging conflicting circuit interpretations, the Sixth Circuit expressly rejected the need to examine the legislative history.[45] Given this Court's decision in *Hayes*, the Sixth Circuit erred by refusing to investigate the legislative history.

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[39] *See* Petitioner-Government, Reply Brief for the United States, No. 12-1371, *U.S. v. Castleman*, at 8-11 (To constitute a misdemeanor crime of domestic violence, the Fourth, Ninth and Tenth Circuits require violent physical force, while the First, Eighth and Eleventh Circuits have held that any physical force is enough (state law misdemeanor crimes involving intentional offensive physical contact qualify as misdemeanor crime of domestic violence)).

[40] *See United States v. Hayes*, 555 U.S. 415 (2009) (relying on legislative history to inform the meaning of § 922(g)(9) and § 921(a)(33) and resolve circuit conflicts); *see Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993) (This Court granted Certiorari "in light of the sharp divisions among the courts regarding the proper standard for the admission of expert testimony." This Court resolved these circuit conflicts by examining the text of the rule, the drafters' intent, the drafting history, and the general purpose and approach of the Federal Rules of Evidence.).

[41] *United States v. Hayes*, 555 U.S. 415 (2009).

[42] *Id.* at 426-27.

The legislative history supports the extension of the Lautenberg Amendment to all predicate misdemeanor crimes of domestic violence, the Senator's statements noted that the predicate offense is not limited to crimes involving "actual physical violence."[46] In fact, the definition was meant to include, "anyone who attempts or threatens violence against a loved one." The threat or attempt of violence alone is sufficient to establish a convicted abuser "pose[s] an unacceptable risk, and should be prohibited from possessing firearms."[47]

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[43] *Id.*

[44] *See* Petitioner-Government, Reply Brief for the United States, *supra* note 38 at 8-11 (To constitute a misdemeanor crime of domestic violence, the Fourth, Ninth and Tenth Circuits require violent physical force, while the First, Eighth and Eleventh Circuits have held that any physical force is enough (state law crimes involving intentional offensive physical contact qualifies as misdemeanor crime of domestic violence)).

[45] *Castleman*, 659 F.3d at 585-86.

[46] 142 Cong. Rec., S11878.

Ignoring Congressional intent, the Sixth Circuit erroneously concludes that a "misdemeanor crime of domestic violence" requires "violent physical force."[48] This misinterpretation directly contradicts Congress's manifest purpose and constrains the ability of prosecutors to remove and prohibit an abuser's access to firearms.[49]

B. The Sixth Circuit's Misinterpretation of the Lautenberg Amendment Limits the Efficient and Successful Prosecution of Domestic Abusers and Hampers the Ability of Police Chiefs to Prevent Abusers from Joining their Ranks

In states that consistently prosecute firearms offenders and enforce firearm prohibitions, thirty-eight percent (38%) fewer women are shot to death by intimate partners.[50] Consistent enforcement of firearm

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[47] *Id.* Senator Lautenberg's statement does not make any reference to actual physical violence. Rather, the late Senator declares Congress's near unanimous support for removing guns from abusers convicted of a predicate offense including either *attempted or threatened violence* against a loved one.

[48] *Castleman*, 659 F.3d at 585-89.

[49] 142 Cong. Rec., S11878, *supra* note 46.

[50] *See* U.S. Department of Justice, Federal Bureau of Investigation, Uniform Crime Reporting Program Data: Supplementary Homicide Reports, 2010, *available at* http://www.icpsr.umich.edu/cgi-bin/file?comp=none&study=33527&ds=1&file_id=1082869

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prohibitions allows communities to increase victim, officer, and public safety by reducing the threat of lethal violence.[51] A national report analyzing the enforcement of domestic violence firearm prohibitions concluded domestic homicides can be linked with failing to use all of the available prosecutorial resources to prevent offenders from possessing firearms.[52]

Limiting prosecutors' enforcement of the Gun Control Act and the Lautenberg Amendment against abusers who are convicted of a predicate misdemeanor offense requiring strong and violent physical force constrains prosecutors' ability to remove guns from abusers convicted of crimes under common assault and battery statutes. Without proof of strong and violent physical force, prosecutors cannot even charge a qualifying misdemeanor, which means that abusers who do not leave trace evidence of violent physical

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(excludes New York due to incomplete data); Mayors Against Illegal Guns, *supra* note 17 at 1.

[51] *See* U.S. Department of Justice, Federal Bureau of Investigation, Uniform Crime Reporting Program Data: Supplementary Homicide Reports, 2010 (excludes New York due to incomplete data), *available at* http://www.icpsr.umich.edu/cgi-bin/file?comp=none&study=33527&ds=1&file_id=1082869; U.S. Department of Justice, Office on Violence Against Women & National Center on Full Faith and Credit, Enforcing Domestic Violence Firearm Prohibitions: A report on Promising Practices, 3 (Sept. 2006), *available at* http://www.bwjp.org/files/bwjp/articles/Enforcing_Firearms_Prohibitions.pdf.

[52] Office on Violence Against Women & National Center on Full Faith and Credit, *supra* note 51 at 3.

force on their victims would never be charged.[53] Such a narrow definition would exclude a large percentage of domestic violence offenders from the Amendment's reach, including those who strangle, stalk and molest their victims, to name a few.

Congress intended to empower prosecutors to remove firearms from domestic abusers, with the "hope that the enforcement of the law will be as rigid as the law very simply defines it."[54] In interpreting the Lautenberg Amendment to the Gun Control Act, the Criminal Division of the Department of Justice defined "misdemeanor crime of domestic violence" as including "all misdemeanors that involve the use *or attempted* use of physical force," thus recognizing that the statute was meant to empower federal prosecutors to, "prevent those individuals who have demonstrated *a propensity* for domestic violence from obtaining a firearm."[55] An abuser who attempts

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[53] Moreover, nearly half of the states' common assault and battery statutes would not qualify as a predicate offense under the Sixth Circuit's holding. *See* Petitioner-Government, Reply Brief for the United States, *supra* note 39 at 14 ("the generic assault and battery laws of about half of the States do not draw distinctions between different degrees of force.").

[54] 142 Cong. Rec., S11876 (Sept. 30, 2006) (Floor Statement of Senator Frank Lautenberg).

[55] U.S. Department of Justice, Office of the United States Attorneys, Criminal Resource Manual, 1117 Restrictions on the Possession of Firearms by Individuals Convicted of a Misdemeanor Crime of Domestic Violence, *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm01117.htm. In this memo, the Criminal Division of the Department of

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physical force or makes threats with a deadly weapon against a domestic partner has demonstrated such a propensity.

Likewise, in *Hayes*, this Court acknowledged the dilemma faced by prosecutors limited by the evidentiary requirement of physical violence. Articulating the legal basis for extending the firearm restriction to abusers convicted of a misdemeanor crime of domestic violence, this Court illustrated:

> Existing felon-in-possession laws, Congress recognized, were not keeping firearms out of the hands of domestic abusers, because "many people who engage in serious spousal or child abuse ultimately are not charged with or convicted of felonies." 142 Cong. Rec. 22985 (1996) (statement of Sen. Lautenberg). By extending the federal firearm prohibition to persons convicted of "misdemeanor crime[s] of domestic violence," proponents of §922(g)(9) sought to "close this dangerous loophole." *Id.*, at 22986.
>
> Construing §922(g) to exclude the domestic abuser convicted under a generic use-of-force statute (one that does not designate a domestic relationship as an element of the offense) would frustrate Congress' manifest purpose.

Justice defines "misdemeanor crime of domestic violence" as including "all misdemeanors that involve the use *or attempted* use of physical force."

> Firearms and domestic strife are a potentially deadly combination nationwide.[56]

In the matter currently before this Court, excluding domestic abusers convicted under a statute requiring less than "strong and violent physical force" frustrates Congress's manifest purpose by directly impeding robust enforcement of the law. Prosecutors will be limited to enforcing the law against a mere subset of abusers convicted of a predicate misdemeanor that has, as an element, the use of violent physical force.[57] Many domestic abusers would therefore have continued access to firearms as most assault and battery offenses do not require violent physical force.[58] Such restrictive enforcement directly contradicts Congressional intent to remove firearms from domestic abusers convicted of *any crime of domestic violence*.[59]

A ruling from this Court rejecting the Sixth Circuit's analysis ensures nationwide consistency in the application of the firearms restriction to any misdemeanor crime of domestic violence, rather than those involving only physical force. This will enable prosecutors and law enforcement to carry out Congress's express intent to "decreas[e] the possibility of deadly violence," by successfully removing firearms from the hands of abusers involved in "certain explosive domestic situations."[60]

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[56] *Hayes*, 555 U.S. at 426-27.

[57] *See* Petitioner-Government, Petition for a Writ of Certiorari, *supra* note 35 at 24.

[58] *Id.*

[59] 142 Cong. Rec., S10377-01, S10378 (Sept. 12, 1996).

The criminal justice and civil legal systems can significantly enhance victim, officer, and public safety through the proper enforcement of federal and state statutes prohibiting domestic abusers from possessing firearms.[61] In a 2013 study, the Center for American Progress found a "clear link between high levels of gun violence and weak state gun laws."[62] This national study revealed that Tennessee ranked number eleven (11) for the weakest firearm laws in the United States, and in 2011, experienced the sixth highest number of males murdering females.[63] Upholding the Sixth Circuit decision will further prohibit prosecutors' uniform enforcement of the Gun Control Act and likely contribute to Tennessee's firearm violence.[64]

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[60] Criminal Resource Manual, *supra* note 55.

[61] Office on Violence Against Women & National Center on Full Faith and Credit, *supra* note 51 at 3.

[62] Gerney, *supra* note 11 at 1.

[63] *Id.*

[64] Notably, police chiefs have the discretion to disqualify any officer from employment previously convicted of a misdemeanor crime of domestic violence. The Sixth Circuit's narrow reading would allow domestic abusers who stop short of physical violence to join the force, eroding the ability of police leadership to keep state-issued firearms out of abusers' hands.

CONCLUSION

For the foregoing reasons, the Sixth Circuit Court of Appeals erred in finding that the Gun Control Act, including the Lautenberg Amendment, require that the underlying misdemeanor conviction have, as an element, violent physical force. Such a finding results from a misreading of the plain meaning of the statute, is inconsistent with Congressional intent, defies the evidence-based definition of domestic violence, frustrates the purpose of the statute and dramatically increases the potential threat that abusers with firearms pose to police officers and the public at large. These *amicus* respectfully request that Judgment of the Sixth Circuit Court of Appeals be reversed, and judgment entered for Petitioners.

Respectfully submitted,

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